

(5) Supreme Court, U.S.

F I L E D

DEC 7 1998

No. 98-5881

CLERK

In The  
**Supreme Court of the United States**  
October Term, 1998

BENJAMIN LEE LILLY,

*Petitioner,*

v.

COMMONWEALTH OF VIRGINIA,

*Respondent.*

On Writ Of Certiorari To The  
Supreme Court Of Virginia

JOINT APPENDIX  
VOLUME I, Pages 1 to 297

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**CIRCUIT COURT OF THE  
COUNTY OF MONTGOMERY**

**Circuit Court of Montgomery County  
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**SUPREME COURT OF VIRGINIA**

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VIRGINIA STATE SUPREME COURT  
CASE# 972385 CONSOLIDATED WITH CASE# 972386  
BENJAMIN LEE LILLY  
V.  
COMMONWEALTH OF VIRGINIA

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05/18/98 PETITION FOR REHEARING

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01/07/98 BRIEF OF APPELLANT  
02/09/98 BRIEF OF APPELLEES  
02/20/98 REPLY BRIEF

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**CIRCUIT COURT OF THE  
COUNTY OF MONTGOMERY**

**IN VIRGINIA:**

**IN THE CIRCUIT COURT OF  
MONTGOMERY COUNTY**

<b>COMMONWEALTH OF )</b>	
<b>VIRGINIA )</b>	
Plaintiff )	<b>Motion In Limine</b>
v )	(Filed Oct. 21, 1996)
<b>BENJAMIN LILLY )</b>	
Defendant )	

Comes Now the Defendant, Benjamin Lilly, by and through counsel, pursuant to the 6th, 8th, and 14th Amendments of the Constitution of the United States, and asks this Court for an order precluding the admission of the statements of Mark Lilly that were given to Investigator Gary Price of the Giles County Sheriff's office, should Mark Lilly be unavailable to testify, based on the following grounds;

- 1) Admission of said statements would violate the Defendant's sixth amendment, through the fourteenth amendment, right to cross-examine one of the alleged accomplices [sic] about a purported confession. *DOUGLAS v ALABAMA*, 380 U.S. 415, 1964, *BRUTON v UNITED STATES*, 391 U.S. 123, 1968, *CRUZ v NEW YORK*, 481 U.S. 186, 1986.
- 2) Admission of said statement would violate the Defendant's 6th 8th and 14th amendment rights because the statements that Mark Lilly gave would not conform to any hearsay exception, namely against his penal interest, because they are not reliable due to their self-serving

nature at crucial times of the confession such as the statements that he got into the victim's car because "I had to or get left man, I was so drunk." or when at the murder scene he stated that he never got out of the car, or when discussing the robberies in Giles he states that "they wanted to rob it, they figured that . . ." or when questioned about why he took beer from one store he stated "I was so drunk, I don't do that shit, you know if I am sober . . .". *DOUGLAS v ALABAMA*, 380 U.S. 415, 1964, *BRUTON v UNITED STATES*, 391 U.S. 123, 1968, *CRUZ v NEW YORK*, 481 U.S. 186, 1986.

3) Admission of said statement would violate the Defendant's 6th, 8th, and 14th, Amendment rights because the statements that Mark Lilly gave that may incriminate Benjamin Lilly would not conform to any hearsay exception, namely against penal interest, because the statements would not be against Mark Lilly's penal interest, but rather the Defendant's. *DOUGLAS v ALABAMA*, 380 U.S. 415, 1964, *BRUTON v UNITED STATES*, 391 U.S. 123, 1968, *CRUZ v NEW YORK*, 481 U.S. 186, 1986.

/s/ Christopher A. Tuck  
Benjamin Lilly by counsel

#### Certificate of Service

I, Christopher A. Tuck, do hereby certify that a true and correct copy of the above motion has been mailed and/or hand delivered to Phillip Keith, Commonwealth Attorney, Post Office Box 38, Christiansburg, Virginia, 24073, on this 20th day of October, 1996.

/s/ Christopher A. Tuck  
Christopher A. Tuck

---

\* \* \*

[773] well as your grounds and argument, Mr. Tuck.

MR. TUCK: Your Honor, we believe that the Commonwealth will be calling Mark Lilly to the stand. He may or may not take the Fifth Amendment because some of his statements might incriminate him. That question, if he does not take the stand, it is our understanding that the Commonwealth intends to simply introduce transcripts that conspired or, between police officers and statements made by Mark Lilly. We believe that it's, if that is done that that will violate the confrontation clause of the Sixth Amendment as guaranteed to all citizens through the Fourteenth Amendment of the United States Constitution. Ben Lilly has a right to look at his accusers in the face and the jury has the ability to look at his accusers in the face and see, and, and the jury has the ability to look at that person and see if they're telling the truth. Clearly, if that is done, these statements are entered, then he will not have the ability to confront his accusers. Your Honor, we will not have the ability to ask Mark Lilly why he says that the shooting took place ten to fifteen yards away and [774] Gary Barker said they took place point blank. I won't have anybody to cross-examine. Your Honor, he indicates in one of his statements that he had money in his pocket and he could have paid for the beer that was done and that he didn't need to rob it. But in the other statement that he gives to Officer Hamlin, he says, no, I don't have, I, we, were broke. Clearly, these statements have inconsistencies. They are self-serving as well. If you look at the motion that I filed with the Court, he indicates he was so drunk he doesn't remember. That it wasn't he, ah, that, ah, did anything

wrong, it was Gary Barker and Ben Lilly doing things wrong throughout the course of this evening. He says he was so drunk he doesn't remember. At any key point, did you know that they were going to go in and rob it? No, it, or it was their decision. I had money to pay for it. Did you know, did you handle the guns that evening? No, and the Court's already seen evidence that the pistol was seventy-five feet down behind the car. It had to get there somewhere, Your Honor, and Gary Barker has already testified that he didn't take it down there, so this is [775] another inconsistency with Mark Lilly's statements. Mark Lilly is trying to put himself off as just a, a, being intoxicated and not doing anything wrong in this case whatsoever. That is not an acceptable, ah, exclusion for a, the confrontation clause. It has to be against his own penal interest and the statements that he has given put him far away from the crime. They do not talk about the fact that he did. What did he do in Montgomery County? Well, I had to get in the car because I was so drunk. I didn't want to get left behind. Not that I knew what was going on. Which is totally inconsistent with what Gary Barker's testimony has been, and, Your Honor, I won't have anybody to cross-examine and he has that right based on the Sixth Amendment and when he gets in that stand, we won't be able to cross-examine and that's why it's so important to our system for the, when the, a jury to look at that witness and be able to say, there's discrepancies in their testimony. I won't be able to ask Mark Lilly, did you possess this money clip? I won't be able to do that because I don't have the right to confront him. My client has been denied that right if [776] the Court rules against us. That's why it's so important. We're talking about a

murder trial and we're talking about whether a man lives or dies. This is not a shoplifting case and I am asking this Court, I am imploring this Court allow us the right to confront the witness and if we don't have that right, then to keep the statements out. Thank you, Your Honor.

THE COURT: Thank you, Mr. Tuck. Let me ask you a question. What is your argument if Mr. Lilly, I'm talking about Mark Lilly, -

MR. TUCK: Yes, Your Honor.

THE COURT: If he is available, the Commonwealth calls him as a witness, he is sworn, he is seated in the witness chair, and then he takes the Fifth Amendment against self-incrimination. Where is your argument as to whether such circumstances make him unavailable?

MR. TUCK: According to Virginia case law and Federal case law, that would make him or deem him to be unavailable. However, Your Honor, we believe that, frankly, we believe that the Virginia State Supreme Court [777] is wrong. It ruled in it's evidence that this, the whole statement could come in. Not just the statements against their penal interest, but the whole statement. If you look at the way the Federal courts interpret their own rules of evidence and the way that they have interpreted the confrontation clause, they only are allowed to look at the statements that incriminate them and if they get up, because that's where the reliability is. If Mark Lilly would have gotten up and said, I did something wrong here, that portion of the statement can come in. I did something wrong, but that's not what, that's not what the Commonwealth I, we believe again, that's not why they're going to be offering it. They're going to want to

be offering it for the truth of the matter that Ben Lilly did something wrong and when that is done, we're talking about how, how, anything I say, if I got up in my opening argument or in closing argument and say, Mark Lilly says it's thirty, ten yards, fifteen yards, that would be thirty to forty-five feet and Gary Barker says that it's, ah, ah, point blank range. Your Honor, I don't have anybody to cross-examine. Anything that I say [778] is not evidence. I don't have anybody, any way of pointing that out because there is no one on the stand for me to cross-examine.

THE COURT: Thank you, Mr. Tuck.

MR. JENKINS: Your Honor, could I just give the Court a couple of cases I think will be on -

THE COURT: Mr. Tuck may insofar as this motion is concerned.

MR. TUCK: Your Honor, I -

MR. JENKINS: Okay.

MR. TUCK: Omitted just for the record *Douglas v. Alabama*, -

THE COURT: And that has already been submitted and reviewed by the Court -

MR. TUCK: I believe that's correct. *Brutan v. United States* -

THE COURT: That has been submitted and reviewed by the Court.

MR. TUCK: I believe *Crews v. New York*. I also believe I had submitted to the Court two other cases. That was an *Idaho v. Wright* and just to [779] briefly discuss

*Idaho v. Wright*, Your Honor, while we're talking about some of the case law, that case was, involves a rule in Idaho that said there is a general hearsay that if it's reliable, the Court can have, let it in. And the Supreme Court said that's not a well-founded reason. One of the defendants objected as to hearsay. That defendant is still incarcerated. The other defendant objected as to the Sixth Amendment right to confrontation. The Supreme Court overturned that person's conviction is my understanding.

THE COURT: All right. Thank you, Mr. Tuck. Mr. Schwab, any response to the defense's argument?

MR. SCHWAB: Well, Your Honor, assuming that Mark Lilly will be unavailable because he takes the Fifth Amendment, his Fifth Amendment rights and refuses to be compelled to testify on matters that may incriminate him. The Commonwealth's view of the law is that while the defendant has a Sixth Amendment right it has been consistently held that that right does not override everything else, including and mentioned [780] specifically in the *Idaho v. Wright* that it doesn't override and they have refused to say that it will override other exceptions in evidence. They, the rule essentially is that evidence primarily of co-defendants in this case, well, let me back up, the rule is, matters may come in the Court that would violate the Sixth Amendment Confrontation Right if there is, in their terms, a well-rooted basis for admission of hearsay and that was pointed out several times in the *Idaho case* because the *Idaho case* involved a statutory residual hearsay. That's what the case was about as the Court knows. That's what the argument was over and the Supreme Court of the United States in that case held that residual hearsay was not sufficient enough to be what

they called a well-rooted exception to the hearsay rule. In this case, it has been held for years and years in this jurisdiction as well as others and as Mr. Tuck pointed out, it is admissible even under the Federal Rules of Evidence for statements against penal interest. We would submit to the Court that that is a well-rooted basis for admission of hearsay. The Virginia Rule is [781] that the whole statement can come in. The Court has seen in the *Scaggs case* and the *Chandler case* which discussed what part could come in and whether or not it was incriminating and what made it against a person's penal interest. It didn't have to be a full confession essentially as long as it put them in jeopardy of prosecution. That being the case, it would appear that if he is unavailable, there is an exception to the hearsay which would allow those statements in and that it would not violate his constitutional rights based on the current status of the law. As far as I can tell, the U.S. Supreme Court has never had the issue nor made a ruling on whether or not a state well-rooted basis for admission of statements by and unavailable declarant concerning their penal interest is or is not a well-rooted matter. Certainly they had something in mind when they used that term and those would, one would assume from the cases below, from the Virginia cases on that point that, in fact, that's what they were looking to and while the case the defense has cited concerning the Federal Rules of Evidence, it did mention the [782] confrontation clause and if I remember correctly, they ruled only that part of the statement could come in under the Federal Rules of hearsay. They did not make the Federal Rules of Evidence due process requirements upon all the states of the United States of America. Only in their Courts where

their rules were they said that's the rule they will use and how they will allow the information in concerning that hearsay exception and the current state of the law is that it's admissible and one other thing I'd like to say, Judge, that I'm sorry that the law of this Commonwealth should be different for murderers than for shoplifters, but I believe it should be the same no matter what the case is and it should not be argued or ruled upon by the Court simply because it's a murder case rather than a shoplifting, you ignore the current state of the law.

THE COURT: All right, Mr. Schwab. Let me ask you the same question that I asked Mr. Tuck. What is your argument as to whether or not Mark Lilly is available if, in fact he's sworn, takes the witness stand and responds, ah, by taking the Fifth Amendment against [783] self-incrimination. What is your opinion as to whether or not in terms of Virginia president, precedent that he is available or unavailable?

MR. SCHWAB: I cannot point to anything in the two cases I provided you, but it is my understanding of the law that one of the ways, although it may have been in FRIEND, I believe, noted with a citation that if a person does take the Fifth Amendment and cannot be compelled to testify, then that person is unavailable, ah, for testimony.

THE COURT: All right, sir. Thank you. Mr. Tuck, you have the burden on this motion, so I'll let you -

MR. TUCK: Your Honor, actually I believe that you, I, while we're making the Motion in Limine, I believe the burden always remains on the Commonwealth.

THE COURT: Well, the burden is on the Commonwealth, but what I meant to say is you, you are making this motion.

MR. TUCK: Your Honor, one of the [784] points that the Commonwealth brought up is this declaration against penal interest. Where is this a self-serving statement? Look at the, we're here for a charge of capital murder, abduction, robbery. Look at the statements as to those events and it don't incriminate him. He says he goes along just because he was drunk and didn't want to be left behind. He really didn't know what he was doing. Look at the statements that he gave. Is that the same reliability that the Commonwealth that, that even the Virginia Supreme Court cases have said, there has to be some reliability here before we're going to let a hearsay statement in and trample over the defendant's rights and when you start looking at the, he made statements, he didn't, ah, he can't remember if he had any guns or not because he was too drunk. Ah, he gives, we know that at one point in time that he, he mentions that the fact that he didn't indicate he wanted to commit any robberies. That it was just they wanted to do it. He, he keeps pushing the blame away from himself and that's not a declaration against the penal interest. That's a self-serving [785] statement. Now, the Commonwealth may argue, well, just because he's drunk doesn't mean that he wouldn't be an accomplice, but if someone is unconscious or because he indicates that he was blacking out that might make, that might be a defense. Clearly, Your Honor, as I stated earlier, we believe that this would be a violation of his rights and this is an important right. Thank you, Your Honor.

THE COURT: Thank you, Mr. Tuck. We'll be in recess for about ten minutes to consider your arguments.

MR. JENKINS: Your Honor, you'll be back by yourself, is that correct, in considering it?

THE COURT: Yes, sir.

MR. JENKINS: I'm going to make a telephone call.

THE COURT: Without any coaching from the principals in this matter.

MR. JENKINS: Thank you, Judge.

MR. TUCK: Thank you.

BAILIFF WEAVER: Everyone rise.

\* \* \*

[787] Courtroom until the jury gets out.

THE COURT: All right, Mr. Weaver, if you'll recess Court until 1:00. If you'll just tell me when they're on the elevator.

THE COURT: Mrs. Cole, for the record that the response to the defendant's motion is made outside the presence of the jury. Gentlemen, in response to the defendant's motion and considering the arguments herein, as well as the case law submitted by both parties, the Court finds as follows:

The Commonwealth has the burden to prove the unavailability of Mark Lilly as a witness. Should the Commonwealth call Mark Lilly, if Mark Lilly is sworn and if Mark Lilly takes a seat in the witness box and

thereafter refuses to answer any questions asserting his Fifth Amendment Right against self-incrimination, then in those events, the Commonwealth has met its burden in showing the unavailability of Mark Lilly as a witness. If on the other hand the Commonwealth does not call Mark Lilly as a witness, then her burden would not be met and these statements will not be admitted pursuant to the [788] hearsay rule. It's well-settled in this Commonwealth that a declaration against penal interest is a recognizable exception to the hearsay rule. However, such a declaration is admissible only upon showing that the declaration is in fact reliable. And in considering whether or not such statements made by Mark Lilly to the officers is reliable and trustworthy, the Court looks at the evidence and exhibits before it and the facts and circumstances of this particular case. In addition, the Court further looks to examine whether there is any other substantial link to connect Mark Lilly with the crime other than the statements that are at issue here. In so doing, the Court finds that Mark Lilly's statements weren't against his penal interest and that they are reliable and trustworthy. Further, the Court finds that these statements do not violate the confrontation clause when they are admitted as hearsay under the quoted exception, which is firmly rooted. The Court will, therefore, following the precedent established within this Commonwealth, admit these statements in whole. If you want to note your objections?

[789] MR. TUCK: Your Honor, we would note our objections based on the Sixth, Eighth and Fourteenth Amendments based on the grounds that I have already stated. We would also, it's my understanding that the Commonwealth will be playing the tapes. If the Court

would, and I believe the Commonwealth would agree, we do have copies of the transcripts of these tapes. We were, they were never in the Commonwealth Attorney's file and they were not provided to us under discovery, the tapes themselves, and we would object to the tapes being played before the jury because we did not receive them and based on *Brady* I believe we are required to receive them and we would ask the Court not to allow them into evidence.

THE COURT: All right, sir. What I will do, Mr. Tuck, is allow you time to review the transcript.

MR. TUCK: Your Honor, the transcripts is one thing, but the voice inflections as far as on the tape they may have been exculpatory, they may be exculpatory, I don't know. The Commonwealth I do not believe ever had these in his possession, but as the

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**VIRGINIA:****IN THE CIRCUIT COURT OF THE  
COUNTY OF MONTGOMERY****APRIL 1, 1996****THE GRAND JURY CHARGES THAT:**

**On or about December 5, 1995, in the County of Montgomery,**

**BENJAMIN L. LILLY did seize from Alexander V. Defilippis a 1986 Dodge Aries belonging to Ezio Defilippis with the intent to deprive Alexander V. Defilippis of possession of the automobile by means of the threat or presenting of a firearm; these acts constitute the crime of carjacking.**

**VA. CODE § 18.2-58.1.**

**A TRUE BILL**

**/s/ Robert K. Illegible  
FOREMAN**

**WITNESS:**

**Investigator R.L. HAMLIN**

---

**VIRGINIA:****IN THE CIRCUIT COURT OF THE  
COUNTY OF MONTGOMERY****APRIL 1, 1996****THE GRAND JURY CHARGES THAT:**

**On or about December 5, 1995, in the County of Montgomery,**

**BENJAMIN L. LILLY did use or display in a threatening manner a firearm while carjacking the automobile in possession of Alexander V. Defilippis.**

**VA. CODE § 18.2-53.1.**

**A TRUE BILL**

**/s/ Robert K. Illegible  
FOREMAN**

**WITNESS:**

**Investigator R.L. HAMLIN**

---

**VIRGINIA:**

**IN THE CIRCUIT COURT OF THE  
COUNTY OF MONTGOMERY**

**APRIL 1, 1996**

**THE GRAND JURY CHARGES THAT:**

**On or about December 5, 1995, in the County of Mont-  
gomery,**

**BENJAMIN L. LILLY, by force or intimidation, did seize,  
take and transport Alexander V. Defilippis with the intent  
to deprive him of his personal liberty without legal justi-  
fication or excuse; these acts constitute the crime of  
abduction.**

**VA. CODE § 18.2-47; Punishment: 18.2-10(e).**

**A TRUE BILL**

**/s/ Robert K. Illegible  
FOREMAN**

**WITNESS:**

**Investigator R.L. HAMLIN**

---

**VIRGINIA:**

**IN THE CIRCUIT COURT OF THE  
COUNTY OF MONTGOMERY**

**APRIL 1, 1996**

**THE GRAND JURY CHARGES THAT:**

**On or about December 5, 1995, in the County of Mont-  
gomery,**

**BENJAMIN L. LILLY did use or display in a threatening  
manner a firearm while abducting Alexander V.  
Defilippis.**

**VA. CODE § 18.2-53.1.**

**A TRUE BILL**

**/s/ Robert K. Illegible  
FOREMAN**

**WITNESS:**

**Investigator R.L. HAMLIN**

---

**VIRGINIA:**

**IN THE CIRCUIT COURT OF THE  
COUNTY OF MONTGOMERY**

**APRIL 1, 1996**

**THE GRAND JURY CHARGES THAT:**

**On or about December 5, 1995, in the County of Montgomery,**

**BENJAMIN L. LILLY did rob Alexander V. Defilippis of his wallet, watch, clothing, and other personal belongings.**

**VA. CODE § 18.2-58.**

**A TRUE BILL**

**/s/ Robert K. Illegible  
FOREMAN**

**WITNESS:**

**Investigator R.L. HAMLIN**

---

**VIRGINIA:**

**IN THE CIRCUIT COURT OF THE  
COUNTY OF MONTGOMERY**

**APRIL 1, 1996**

**THE GRAND JURY CHARGES THAT:**

**On or about December 5, 1995, in the County of Montgomery,**

**BENJAMIN L. LILLY did use a firearm while robbing Alexander V. Defilippis.**

**VA. CODE § 18.2-53.1.**

**A TRUE BILL**

**/s/ Robert K. Illegible  
FOREMAN**

**WITNESS:**

**Investigator R.L. HAMLIN**

---

**VIRGINIA:**

**IN THE CIRCUIT COURT OF THE  
COUNTY OF MONTGOMERY**

**APRIL 1, 1996**

**THE GRAND JURY CHARGES THAT:**

**On or about December 5, 1995, in the County of Montgomery,**

**BENJAMIN L. LILLY did willfully, deliberately, and with premeditation kill and murder Alexander V. Defilippis in the commission of robbery while armed with a deadly weapon.**

**VA. CODE § 18.2-31.4; Punishment: § 18.2-10(a).**

**A TRUE BILL**

**/s/ Robert K. Illegible  
FOREMAN**

**WITNESS:**

**Investigator R.L. HAMLIN**

---

**VIRGINIA:**

**IN THE CIRCUIT COURT OF THE  
COUNTY OF MONTGOMERY**

**APRIL 1, 1996**

**THE GRAND JURY CHARGES THAT:**

**On or about December 5, 1995, in the County of Montgomery,**

**BENJAMIN L. LILLY did use a firearm to murder Alexander V. Defilippis.**

**VA. CODE § 18.2-53.1.**

**A TRUE BILL**

**/s/ Robert K. Illegible  
FOREMAN**

**WITNESS:**

**Investigator R.L. HAMLIN**

---

**VIRGINIA:**

**IN THE CIRCUIT COURT OF THE  
COUNTY OF MONTGOMERY**

**APRIL 1, 1996**

**THE GRAND JURY CHARGES THAT:**

**On or about December 5, 1995, in the County of Montgomery,**

**BENJAMIN L. LILLY, having previously been convicted of a felony under the laws of this Commonwealth, did knowingly and intentionally possess a firearm.**

**VA. CODE § 18.2-308.2A(i); Punishment § 18.2-10(f)**

**A TRUE BILL**

**/s/ Robert K. Illegible  
FOREMAN**

**WITNESS:**

**Investigator R.L. HAMLIN**

---

**Interviewer: Lieutenant Gary Price**

**Interview with  
William Whitsett  
December 7, 1995**

**At the Giles County Sheriff's Office**

**Interviewer: Lieutenant Gary Price**

**Date: December 7, 1995  
Time: 11:15 AM**

**G.P. I will be talking with Pearisburg Chief, William Whitsett. Chief, the other night on December the 5th, during the incidents of the two armed robberies in the Eastern section of the county, you contacted the office and asked if any additional assistance would be needed in that area. And I, as a member of the Sheriff's Office, requested that you do respond to that scene of which you did. When you arrived in that area, did you have an occasion to see or have a conversation with any of the three subjects that were apprehended?**

**B.W. Yes, I did.**

**G.P. Which subject did you meet or have a conversation with?**

**B.W. I had the occasion to have a conversation with a person that was later identified to me as Mr. Ben Lilly, who happened to be seated in the rear of officer Randy Tilley's police car.**

**G.P. If you would, tell us what that conversation consisted of.**

**B.W. Well, at the time of my arrival you had, of course, had Mr. Ben Lilly in custody, and another subject who I didn't know who was at that time, had just been apprehended. I went to assist Pearisburg unit,**

Randy Tilley, he had in the back seat of his car Mr. Ben Lilly. I guess I was with Mr. Ben Lilly for about an hour or so, I don't know, I don't have exact times. But, during that hour that I was with Mr. Lilly, he made a special request to me. He asked me if I would do him a special favor. I asked him what that favor was and he said that he wanted me to put the barrel of the shot gun I had in my hand in his mouth and pull the trigger. I said "Well, you know that I can't do that. Do I look like a murderer?" And he said something and he was sitting in the police car at the time with the window cracked probably about five or six inches. And I said, "Well, what does a murderer look like anyway?" And he sort of hesitated a moment and I backed away from the car and I thought I heard him say "Me."

G.P. Referring to himself?

B.W. Himself. And then I went back to the cracked door, I said "What did you say?" He said that he was gonna go to hell and meet with his brother. I said "Well, why would, what are you talking about?" And he said that his brother had committed suicide some eight years earlier the 12th of December as a matter of fact, eight years ago. And I said "Well, why would your brother be in hell?" He says, "Well, he may not be there. He probably won't be there." And I said "Well, why would you be in hell?" And that's when he ceased making any further comments.

G.P. During the time prior to this or after this did you attempt to solicit information concerning any of the crimes that had just occurred from this subject?

B.W. The only information I was attempting to solicit from Mr. Lilly, Mr. Ben Lilly, at that time was a description of this fourth person. Who, we later

found out was not at existence, but that was the only information I was attempting to solicit from him.

G.P. And the statements that he made to you about placing a gun into his mouth, that is an unsolicited conversation that he initiated?

B.W. Oh yeah. I was just standing there and he asked me to do a special favor. I think it's also important to know that this is prior to any information that we had at that time about a murder that had been committed in Montgomery County. We had no information at that time.

G.P. Interview will end at 11:20 AM.

Transcribed by:

Christy Cumbee

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**INSTRUCTION NO. 31**

The Court instructs the jury that, while they may find a verdict upon the uncorroborated testimony of an accomplice, such evidence is to be received with great caution.

The Court further instructs the jury that the testimony of an accomplice must be received with great care and caution, and if you believe the testimony of an alleged accomplice was false, and that he was induced to testify falsely either by fear or punishment or hope of reward, you must disregard that testimony in its entirety. Nevertheless, if you are satisfied from the evidence of the guilt of the defendant beyond a reasonable doubt, you may convict on the uncorroborated testimony of a single accomplice.

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**JURY INSTRUCTION 36**

Members of jury, as to the testimony of Mark Lilly, you must not draw any INFERENCE WHATSOEVER from the fact that Mark Lilly claimed his lawful right, as guaranteed by the Fifth Amendment, not to be compelled to incriminate himself.

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**SENTENCING ORDER**

VIRGINIA: IN THE CIRCUIT COURT OF MONTGOMERY [sic] COUNTY

FEDERAL INFORMATION PROCESSING  
STANDARDS CODE: 121

Hearing Date: **FEBRUARY 11, 1997**

Judge: **RAY W. GRUBBS**

COMMONWEALTH OF VIRGINIA

V.

**BENJAMIN LEE LILLY, DEFENDANT**

This case came before the Court for sentencing of the defendant, who appeared in person with his attorneys, Christopher A. Tuck and Max Jenkins, **heretofore appointed by the Court to represent him**. The Commonwealth was represented by **E. Curtis Schwab, Jr.**

On **October 25, 1996** the defendant was found guilty by a jury of the following offenses:

CASE NUMBER	OFFENSE AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
13636	CAPITAL MURDER	12-5-95	18.2-31.4
	USE OF FIREARM IN CAPITAL MURDER	12-5-95	18.2-53.1
	ABDUCTION	12-5-95	18.2-47
	USE OF FIREARM IN ABDUCTION	12-5-95	18.2-53.1
	CARJACKING	12-5-95	18.2-58.1

USE OF FIREARM IN CARJACKING	12-5-95	18.2-53.1
ROBBERY	12-5-95	18.2-58
USE OF FIREAM IN ROBBERY	12-5-95	18.2-53.1
POSSESS FIREARM BY A FELON	12-5-95	18.2-308.2.A.(i)

The post sentence report was considered and is ordered filed as a part of the record in these cases in accordance with the provisions of code § 19.2-299.

After hearing evidence on behalf of the defendant, the Court considered the report of the probation officer and the VICTIM IMPACT STATEMENT, and such report is filed herein as a part of the record in these cases in accordance with the provisions of Code § 19.2-299.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced. The Court heard the defendant's statement.

The Court, in accordance with the jury verdicts, SENTENCES the defendant to:

Incarceration with the Virginia Department of Corrections for the term of:

1. CAPITAL MURDER-DEATH
2. USE OF A FIREARM IN CAPITAL MURDER - 3 YRS
3. ABDUCTION - 10 YRS

4. USE OF A FIREARM IN ABDUCTION - 3 YRS
5. CARJACKING-LIFE
6. USE OF A FIREARM IN CARJACKING - 3 YRS
7. ROBBERY-LIFE
8. USE OF A FIREARM IN ROBBERY - 3 YRS
9. POSSESSION OF FIREARM BY A FELON - 5 YRS

The total sentence imposed is DEATH, LIFE (2) PLUS 27 YRS.

After pronouncing sentence, the Court proceeded to advise the defendant of his right to appeal from the sentences heretofore imposed, including the right to have an attorney appointed for him and to have the attorney's fees, costs, and expenses in connection with an appeal paid for him in the event he is financially unable to pay the same.

The costs of this proceeding totals \$69,819.75.

The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Code § 53.1-187.

It is further ordered that as soon as possible after the entry of this order, the defendant be removed and safely conveyed according to law from the jail of this County to

the said penitentiary, therein to be kept, confined and treated in the manner provided by law.

/s/ Illegible  
DATE

ENTER: /s/ Ray W. Grubbs  
RAY W. GRUBBS, JUDGE

DEFENDANT IDENTIFICATION:

Alias: N/A

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Testimony of Gary Price/ Direct

\* \* \*

[242] in very small print, is that correct?

A. That's correct.

Q. Would you examine that transcript and see if that is as far as you know a true copy of that transcript and if that is what you're testimony was on that day?

A. I have reviewed it, and it, it to the best of my knowledge this is the transcript and my testimony.

Q. All right. And you did discuss, have a discussion especially on Page 74, you had a discussion with him about taking a paraffin test, is that correct?

A. I, we refer to it as a GSR Test.

Q. All right.

THE COURT: Which page, Mr. Jenkins?

MR. JENKINS: 74.

THE COURT: All right, sir.

Q. Would you take a look at that page and see if everything in that is correct and true?

A. (Reviewing). To the best of my knowledge, yes.

Q. Okay. And to the best of your knowledge [243] then and even now, you told them it would be voluntary whether or not that he took the paraffin test, is that correct?

A. Yes, sir.

Q. All right.

MR. JENKINS: Your Honor, I'd like to introduce this as our exhibit -

THE COURT: All right, sir.

MR. JENKINS: For this proceeding and I don't know how you want, would like for that to be made.

THE COURT: Any objection, Mr. Schwab?

MR. SCHWAB: No, Your Honor. I believe it's attached to the copy of the -

THE COURT: It is. All right, sir.

MR. SCHWAB: If the Court would simply accept it with the Court and Motion, Your Honor.

MR. JENKINS: That would be agreeable, Your Honor.

THE COURT: I will. It will be filed with the motion.

MR. TUCK: Your Honor, it was filed with [244] the motion as I recall.

THE COURT: Oh, okay. I know I have received a copy of it. All right.

MR. JENKINS: Your Honor, that's all.

THE COURT: All right, thank you. Mr. Schwab.

#### CROSS-EXAMINATION

BY MR. SCHWAB:

Q. Lieutenant Price, you had advised him of his -Miranda Warnings?

A. That's correct.

Q. And how did he waive those Miranda Warnings?

A. According to the transcripts, he did not make any sound. Evidently, he would indicate by shaking his head yes and he also signed a Miranda Waiver Form also indicating that he was willing.

Q. Was that in your presence?

A. Yes, it was.

Q. All right. And how long did the actual interview with Mr. Ben Lilly last?

[245] A. The interview started at 3:55 a.m. and concluded at 4:17, which would be twenty-two (22) minutes.

Q. And any point, and during that time was the, your recorder on the entire time?

A. Yes, it was.

Q. And any time in there, did he indicate he didn't wish to speak with you any further? He wanted to exercise his right to an attorney at that point?

A. He gave me no indication of that.

Q. And where did the interview take place?

A. In the investigation section. We have a interview room.

Q. And how was the defendant dressed at that point, if you recall?

A. According to my notes, he had handcuffs on, but as far as dress, I don't, don't recollect at this time.

Q. Was he handcuffed in the front or back, if you remember?

A. My policy is when I interview them, they [246] are handcuffed. It would be in the front.

Q. And when you completed your interview on tape, that's when you spoke to him about if he'd take the, is it GSR Test?

A. Yes. It's a Gun Shot Residue.

Q. And I believe on the tape you had asked him if he'd fired a gun that day, is that correct?

A. That's correct.

Q. And was anyone else present when you were speaking to him about the possibility of the test?

A. The evidence tech, Mark Skidmore, would have been present. He would have performed the GSR Test.

Q. Okay. And when you say it's voluntary, is there any permission form or anything that your department uses?

A. If he would have, grant us permission we would have had him sign a, a permission to, we consider it a search, and he would have to sign a permission search form.

Q. Now, do you recall for the purposes of this hearing, what his response was to your request that [247] he take a GSR?

A. I would just have to base it on the fact that he did not submit, that his answer was no.

Q. Did you ask him anything else after that? After he indicated for whatever reason he didn't want to take the test? Was there any other further interrogation of him?

A. To my knowledge, no, sir.

Q. Not by you anyway?

A. No, sir.

Q. And where did he go after he finished his interview with you? If you know.

A. I would think to the, before the magistrate.

Q. And who took custody of him at that point? After he left you?

A. To the best of my recollection, it would have been Mark Skidmore and perhaps a jailor.

Q. Mr. Skidmore being the evidence tech?

A. That's correct.

Q. And after you'd ask him if he was willing [248] to take a GSR, Gun Shot Residue Test, did you observe him make any motions with his body?

A. He was rubbing his hands together.

Q. Had he been doing that before?

A. I did not observe him doing that before.

Q. And there was no gun shot residue test performed on him?

A. Not by our department, no, sir.

Q. Was there, did you request that of the other two (2) gentlemen you spoke to that evening concerning these offenses?

A. I -

Q. Mark Lilly and Gary Barker?

A. I did.

Q. And were those, the interviews with them, were they taped?

A. Both interviews were taped. That's correct.

Q. Did you ask both of them while the tape recorder was running if they were willing to take a GSR Test?

[249] A. I reviewed my notes and one was asked while the tape was running and the other one was not.

Q. Did they both sign written waivers?

A. They did, yes, sir.

Q. All right. Thank you.

#### REDIRECT EXAMINATION

BY MR. JENKINS:

Q. Do I understand that they refused to take the paraffin test too?

A. No, they both submitted.

Q. And you all did take from them, is that correct? Are you sure of that?

A. Yes, sir. I have permission slips signed by Mr. -

Q. Lilly?

A. Mark Lilly and Mr. -

Q. Do you know what the results of those tests was? I'm not sure, I don't think we've ever -

MR. SCHWAB: Your Honor, I believe if Mr. Jenkins will read on Page 75 of the transcript they submitted to the Court. Investigator Price, Lieutenant [250] Price answered that question at the preliminary hearing, that they were never submitted.

THE COURT: All right. I'll give you a minute, Mr. Jenkins, to review that.

MR. JENKINS: Well, it's not in the record, Your Honor. If I could cross-examine him on what he testified to, I'd sure appreciate it.

THE COURT: Well, is that not on the record that we have copied here?

MR. JENKINS: Yes, sir, but so was a number of the other things which Mr. Schwab asked on that too, Your Honor.

THE COURT: All right, go ahead.

MR. JENKINS: I just wanted to, it's not fair for him to emphasize that and for us to leave that into the background.

THE COURT: Go ahead.

Q. And what, and you did not submit those test, is that correct?

A. That's correct. Both subjects had indicated they had fired a gun today, that day.

[251] Q. Did they indicate that Mr. Benjamin Lilly had fired a gun?

A. I would have to review -

Q. Okay.

A. Both of their transcripts to see.

Q. Now, let's talk about this paraffin test. You told Benjamin Lilly it was voluntary on his part to take this paraffin examination, is that correct?

A. I can tell you what my wording is normally is by based on what I told -

Q. Well, let me ask you -

A. Mr. Lilly. Mr. Mark Lilly. I can read what I told him on tape and that's generally the way I word things.

Q. Well, but what you testified to under oath in Court on Page 74 of the transcript, which I have just shown you, is that you told them it would be voluntary, is that correct?

A. Yes, it would, generally I'll say, with your permission or if you will give us permission to perform this test on you -

[252] THE COURT: Let Mr., were you on Page 74?

MR. JENKINS: Page 74, Your Honor.

THE COURT: Yeah, but do you have a copy of that transcript, Mr. Price?

MR. JENKINS: Yes, sir, I've already asked him, Your Honor, on direct examination -

THE COURT: All right. Let, let him review it just a minute before he responds to your questions. Page 74.

Q. That was what you told Mr. Lilly, would that be correct? Benjamin Lilly, I'm sorry.

A. That's correct.

Q. All right. Now, -

A. What I said, what I specifically said, this is voluntary or I would have worded it to the fact that if you will grant us permission or if you will allow us, but when his reply was no, then we didn't pursue it.

Q. So, you indicated to him that he had a choice?

A. Correct.

Q. Okay. Now, do I understand that a [253] paraffin examination is where they put paraffin on your hand and they remove it?

A. That method is one of the older methods. The method that's used now days -

Q. What was the method that you were contemplating using that day? Let me put that way.

A. It's, it's no longer using any kind of paraffin or wax. It's a chemical. It comes in a package. A sponge like

container that has chemicals apparently within this container and it is dabbed throughout the hand area, inside and through the fingers area.

Q. And is that taken off? That substance is dabbed in between your fingers. Is that taken off?

A. That, the applicators will pick this gun residue up, yes.

Q. But what, I'm sorry, Gary, what I'm asking you, you've told me that some substance was placed on your hand in the vicinity of the knuckles or the fingers -

A. Yes.

[254] Q. Would that be correct?

A. The gun shot residue collection kit comes with, it's also contained and has its own applicators or what is used to retrieve the -

Q. Okay.

A. From the individual.

Q. So, that's my point. You put some kind of application or a technician does on the hand and that retrieves the gun shot residue, would that be correct?

A. That's correct.

Q. All right. Well, and you were under the impression that you had to get a warrant to do this, is that what I understand your testimony was?

A. I consider it a search, yes, sir.

Q. You consider it a search. Now, did you make an application to the magistrate to search him, to search Benjamin Lilly?

A. No, sir, I did not.

Q. Well, why didn't you?

A. Well, at the time involved and the fact that he was rubbing his hands together would probably, [255] would have eliminated in all likelihood a chance to have retrieved any, any evidence or any residue from his hands.

Q. How did he rub his hands?

A. (Demonstrating with hands).

Q. Did you tell him to stop?

A. No, sir.

Q. Nobody ever indicated to him that he wasn't supposed to rub his hands or stop?

A. Not to my knowledge.

Q. And you told him it was voluntary and he said, I don't want to do it. Would that be correct?

A. That's correct.

Q. That's all.

THE COURT: Any further questions, Mr. Schwab?

MR. SCHWAB: If I could have one moment, Your Honor.

THE COURT: Yes, sir.

## RECROSS-EXAMINATION

BY MR. SCHWAB:

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[86] THE COURT: All right sir, thank you. Mr. Schwab may have some questions to ask you, Mr. Schwab.

MR. SCHWAB: Thank you Your Honor. Mr. Harrison, my name is Skip Schwab, as you may remember from when the Judge introduced everybody, and this is Peggy Frank, she is also an assistant in our office, I'll be handling this case unless I get lucky and get some help from her. This is the part of the proceeding that is known as *voir dire*, where the juror members are questioned so we can select the most fair and impartial jury possible for both Mr. Lilly and the Commonwealth.

MR. HARRISON: Yes sir.

MR. SCHWAB: And that's the way the process works, you are going to be asked a lot of personal questions about your background, about your family, about your beliefs and philosophy, we want you to know that there is no right or wrong answer, what we want you to do is be completely open and honest with it. You are not here to impress anyone, and we don't want you here to impress anyone, but we do apologize if some of the questions seem personal and they may tend to embarrass you. All that being said, Mr. Hampton how do you feel about being here today?

MR. HARRISON: All right.

MR. SCHWAB: Okay, do you have any bumper stickers on your vehicle?

[87] MR. HARRISON: No sir.

MR. SCHWAB: Okay. Now I think you told the Judge that you have heard information about this case?

MR. HARRISON: Through the newspaper.

MR. SCHWAB: Have you ever discussed it with any of your co-workers or friends or anything like that?

MR. HARRISON: Yes sir.

MR. SCHWAB: And did you express any strong opinions about the case when you spoke with your co-workers?

MR. HARRISON: As far as forming an opinion?

MR. SCHWAB: Yes.

MR. HARRISON: Yes sir.

MR. SCHWAB: And do you think there is any possibility of you being able to put that opinion aside and judge the case on what was heard in the courtroom?

MR. HARRISON: No sir.

MR. SCHWAB: All right, thank you sir, I appreciate it.

THE COURT: Thank you Mr. Schwab, are there any questions Mr. Tuck?

MR. TUCK: No questions Your Honor.

THE COURT: All right sir, thank you Mr. Harrison for your honesty and your candor, if you will go with the bailiff please.

[88] MR. HARRISON: Thank you sir.

THE COURT: Gentlemen, is there any challenge to Mr. Harrison.

MR. TUCK: Yes Your Honor, I believe Mr. Schwab would probably concede as well on the last point that he's said that he could not be impartial during the course of this trial based on the information he's received from the media, he's expressed a strong opinion about this case, and he does not believe he could be impartial and we would move for cause to be removed.

THE COURT: All right, thank you Mr. Tuck. Is there anything you wish to add Mr. Schwab?

MR. SCHWAB: No Your Honor.

THE COURT: Do you concur in the defense motion?

MR. SCHWAB: Yes Your Honor.

THE COURT: All right sir, I think having considered Mr. Hampton's responses, it is appropriate that he be dismissed for cause. If you would notify him please that he's free to go. Who is the next member.

MR. TUCK: Do you wish for me to bring Mr. Williams in at this point in time?

THE COURT: Not right this minute. You can tell him it will be a few minutes, and then we'll take that up separately.

[89] THE CLERK: Geraldine Horan, H-o-r-a-n.

THE COURT: Mrs. Horan, is that the correct pronunciation of your name.

MS. HORAN: Excuse me.

THE COURT: You tell me, what is the correct pronunciation of your name?

MS. HORAN: Horan.

THE COURT: Horan. Mrs. Horan, at this stage of the proceedings I am going to ask you several questions to follow through with the questions that I asked you earlier in the day, and also Mr. Schwab, who's the Commonwealth's Attorney will have certain questions to ask you, as well as either Mr. Jenkins or Mr. Tuck, who represent the defendant. I want to make sure that you understand each question that is asked. If you do not understand, you let me know.

MS. HORAN: Okay.

THE COURT: And I also want you to answer these questions as truthfully and as with much candor as you can because your responses are most important.

MS. HORAN: All right.

THE COURT: All right, thank you. The first question that I am going to address Mrs. Horan is whether or not you have ever been convicted of a felony?

MS. HORAN: No, I have not.

\* \* \*

[286] MR. SCHWAB: And do you promise that if in the jury room you have a doubt as to some fact or issue in the case that you will ask yourself whether or not there is a reason for that doubt based on the evidence, your evaluation of the evidence, your common sense and experience?

MS. LOVEDAY: Yes.

MR. SCHWAB: Thank you very much Ms. Loveday.

THE COURT: Thank you Mr. Schwab. Mr. Tuck.

MR. TUCK: Thank you Your Honor. Ma'am, my name is Christopher Tuck, and I've got a little bit of a cold so if you have trouble understanding me please just stop me and let me know and yes I do have a southern accent so if you can't understand that let me know and we'll be happy to repeat the question. Mr. Jenkins and I represent Benjamin Lilly. Mr. Jenkins is the man with the beard back there, and we're going to be asking you several questions just as the Commonwealth did. Some of the questions are a little bit repetitive so please forgive me about that, but the questions are intended to see if you qualify as a juror to sit on this case. Now as you probably know, every citizen has a duty to sit on a jury, but also every citizen has a duty not to sit on that jury if they cannot be fair to themselves, the Commonwealth, or Benjamin Lilly, the defendant in this case. Now you shouldn't be embarrassed if for some reason you don't

serve on this case. It doesn't mean you are on a jury panel it doesn't mean

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#### Testimony of Patricia Quesenberry / Cross

[168] Q. All right. Thank you very much, Ms. Quesenberry.

THE COURT: Mr. Tuck.

MR. TUCK: Thank you, Your Honor.

#### CROSS-EXAMINATION

BY MR. TUCK:

Q. Ms. Quesenberry, hold on a second while I move a little furniture around and I want you to take a deep breath. I know you are nervous. Is this the first time you've ever testified in Court?

A. Uh-huh.

Q. All right. I just want you to take a deep breath and remember what you done. You swore you'd tell the truth. Now, did you ever see during the course of this evening, the night before Alexander Defilippis was murdered, did you ever see Benjamin Lilly with any of the firearms?

A. No.

Q. Now, you indicated that Mark Lilly took a money clip. Could you describe that to the jury? What did the money clip look like?

[169] A. He grabbed it up so fast and stuck it in his pocket because he wanted it. I can just tell you that it was a shiny, gold color is all I could tell you.

Q. Shiny, gold color?

A. Uh-huh.

Q. You indicated that these men had been drinking some liquor, is that correct?

A. Uh-huh.

Q. You said, I believe you indicated about four (4) or five (5) different bottles?

A. Uh-huh.

Q. When you came in you, you, I believe you indicated that you were woke up because you heard the voices, is that correct?

A. Uh-huh.

Q. You came down the hallway and you got to the corner. Do you recall what Ben Lilly had in his hands when you got in there?

A. A bottle of liquor.

Q. All right. What kind of liquor did Ben Lilly have in his hands?

\* \* \*

#### Testimony of Ron Lucas/Direct

[192] well, it's warm. And I said, Mark, is the gun hot? He said, yes, at which time I handed the gun back to him. I put the bullets back into the chamber and handed it back to him and about that time both Gary Barker and Benjamin Lilly came out and approached the car and at that time, I remember Gary reaching in the back seat and pulling out a 12 gauge shotgun and, ah, Ben Lilly was right behind him or close, close there with him, and Ben Lilly said, put the, the God damn guns away, and that's pretty much all I remember the guns being put into the trunk of the car. I got out of the car and went back into Cowboys and they weren't there very much longer.

Q. Did they come back into Cowboys?

A. I don't believe no.

Q. So, you saw a shotgun and a pistol?

A. Yes, sir.

Q. And you said you unloaded the gun and it was a revolver?

A. Yes, sir.

Q. And then reloaded it?

A. I reloaded it, yes.

\* \* \*

#### Testimony of Danny Sanders/Direct

[203] Q. Had either Mark or Gary or both ever been to your residence?

A. Yes, Sir.

Q. Approximately how many times?

A. Ah, two (2) or three (3) times.

Q. And on December 3rd or 4th, were you at home?

A. No, sir.

Q. Where were you?

A. I was in Tennessee.

Q. And what were you doing?

A. Working.

Q. And when did you leave for Tennessee?

A. Ah, on a Monday morning.

Q. Was there anyone else you left at your house?

A. No, Sir.

Q. Was there anyone you left to check on your house?

A. Yes, my sister.

Q. Had you spoken to Gary or Mark about going [204] out of town?

A. Well, they knowed I worked out of town.

Q. But you don't know if they knew you were out of town this time?

A. Yeah, they knowed I was out.

Q. And you left Monday morning?

A. Yes, sir.

Q. Was there a time after Monday morning you had to return home?

A. Ah, well, I didn't come home until on Friday evenings.

Q. Okay. Did you come home earlier that week?

A. Yes, I came home on Tuesday evening.

Q. About what time?

A. Ah, about 7:00 or 8:00.

Q. At night?

A. Yes, Sir.

Q. Was that because you got a call from your sister?

A. Yes, Sir.

\* \* \*

Testimony of Gary Ray Price/Direct

[225] inside the car.

Q. All right. And when you got there where Officer Tilley was, did you see a vehicle besides his?

A. Yes, I did.

Q. And where was that?

A. It was facing the direction in which we were travelling. In other words, it was coming toward us. It was on the side of the road. Had pulled off of the travelled portion of the highway and stopped.

Q. All right. And how far away was the person walking to Officer Tilley when you got there?

A. The -

Q. From the car.

A. From the car. He had parked his car maybe twenty yards, fifteen yards from, from the parked car and the subject was probably half way between the two vehicles some ten yards, ten or twelve yards.

Q. All right. Was this person walking normally or had they, were they in any particularly kind of stance or had their hands -

A. No, he was approaching with his hands up.

[226] Mr. Tilley had a weapon drawn on the subject.

Q. All right. And what happened as he got to Officer Tilley's car?

A. As he came to the car, that's about the time I arrived. We took the subject to the rear of the car, Randy Tilley's car, placed him on the ground and, ah, searched him for weapons and handcuffed him and then placed him in officer Tilley's vehicle.

Q. All right. And who was that person that was walking towards Officer Tilley's car?

A. He was identified as Benjamin Lilly.

Q. And do you see him in the Courtroom?

A. I do.

Q. And would you point him out, please?

A. Sitting between Max Jenkins and Christopher Tuck to my right.

Q. All right. Now, did you assist in the search for weapons -

A. Of Mr. Lilly?

Q. Of Mr., yes.

A. I think I, I covered Officer Tilley while [227] he patted him down and handcuffed him.

Q. All right. Do you know if a knife was removed from him?

A. It was. It was taken from Mr. Ben Lilly's, one of his pants pockets.

Q. Was that turned over to your evidence technician, Mark Skidmore?

A. It was, yes.

Q. All right. Did Mr. Lilly say anything as he approached you all or as you got him to the back of the vehicle?

A. He was asked, I think he was asked how many other people were involved and, ah, or was with him and if they were armed. Officer Tilley also said that he observed two (2) people fleeing the vehicle in addition to Mr. Lilly.

Q. All right. And did Mr. Lilly tell you if there was anybody else with you, with him?

A. He told us that there were three (3) other people and that they had assault rifles.

Q. Did he give you names at that time?

[228] Q. He furnished some names to us, yes.

Q. All right. Do you recall what they were now?

A. The only name I can recall that he furnished was a Rader subject. Either a Mark or a Mike Rader.

Q. All right. And did Mr. Lilly say anything else to you at that time?

A. He indicated that he had been hitchhiking and these, these subjects had picked him up and also that he was working as an undercover officer for the Montgomery County Sheriff's Office.

Q. After he told you he was working undercover for the Sheriff's Office, did he ask you to do anything for him?

A. He indicated that if we would take the cuffs off that he would get us the name and number to call to check on it.

Q. And what did you and the other police officers then do after you had Mr. Lilly in the, Officer Tilley's car?

\* \* \*

[231] Q. Were you able to verify whether or not he was working undercover with anyone with the Montgomery County Sheriff's Office?

A. I did not receive an indication from Montgomery County officers that that was the case.

Q. And did you conduct an interview with Mr. Lilly?

A. Yes, sir, I did.

Q. And where was that conducted?

A. The Sheriff's Office, the investigator's section has an interview room.

Q. All right. And he came to the interview room?

A. Yes, he did.

Q. And at that time, was he given his Miranda Warnings?

A. He was, yes.

Q. And did he agree to waive those and speak with you?

A. Yes, sir, he did.

Q. And you interviewed him at that time, is [232] that correct?

A. Yes, sir, that's correct.

Q. Did you make a recording of that interview?

A. I did.

Q. Have you since had that recording transcribed?

A. Yes, sir, we have.

Q. Have you listened to the, the tape?

A. Yes, sir.

Q. Since that, and have you compared that with the transcription you made?

A. Yes, sir, I have.

Q. And would you tell the Court whether or not it's accurate?

- A. It is an accurate transcript.
- Q. All right. Do you have that with you, sir?
- A. I do.
- Q. And do you, I believe we have a device over here to record that or play it back?
- \* \* \*
- 

Testimony of Gary Ray Price/Direct  
Interview With  
Benjamin Lee Lilly

- Interviewer: Lieutenant Gary Price  
Date: December 6, 1995  
Time: 3:55 AM  
G.P. State your full name.  
B.L. Benjamin Lee Lilly.  
G.P. L\*I\*L\*Y?  
B.L. Yeah.  
G.P. No "E" in it?  
B.L. No.  
G.P. What's your mailing address?  
B.L. Post Office Box 217, Rimer, Virginia 24149  
G.P. And your date of birth?  
B.L. 2/29/ of '68  
G.P. And your social security.  
B.L. 230-96-7040.  
G.P. Okay. Mr. Lilly, I'm an investigator for the Sheriff's Department here and I'm gonna ask you some questions about some things that transpired over the last forty-eight hours. Because the answers you give me may incriminate you in some criminal activity, I'm gonna advise you of the Miranda Warnings and the rights that you have, and I want you to listen to them very carefully. If you have any questions on any of them, I will try to explain them to you so that you fully understand them. You have

the right to remain silent. That means you don't have to talk to me. I can't make you talk to me. Anything that you do tell me, I can and I will use against you in the court of law on any charges that are brought. You have the right to have your attorney with you while you're being questioned and if you cannot afford to hire an attorney, one will be appointed to represent you before any questioning. You can decide at any time to exercise these rights and not answer any further questions or make any further statements. In other words, if you have an attorney retained or whatever, family attorney, you have the right to have them here. If you can't afford one, then the court will appoint one to be with you. If you decide to waive these rights and talk to me and then somewhere along the way you wanna quit, you can quit at any time. Do you understand that?

B.L. \*\*No Statement Made\*\*

G.P. Okay, did you understand those rights?

B.L. \*\*No Statement Made\*\*

G.P. Alright listen to this part, this is equally important, having been advised and fully understanding my rights, do freely and voluntarily, without threats, promises, pressure or coercing agree to talk with Gary Price a law enforcement officer. If you answer my questions, you're doing it on your own free will. I can't make you, I can't force you, and I'm not gonna trick you. Are you willing to answer some questions concerning your activities and those activities of Mark Lilly, your brother, and Gary Barker, a friend of yours, over the last forty-eight, twenty-four hours?

B.L. We'd been ah . . .

G.P. First of all, you willing to answer some questions concerning those?

B.L. \*\*No Statement Made\*\*

G.P. Get you to sign and date that. That states I read the rights and you're talking to me on your own free will.

B.L. You don't have any cigarettes with you do you?

G.P. No, I don't smoke and you got the same problem up her you had down stairs with those computers. I'll get you outta here and let you have another one here in a few minutes.

B.L. Today's date?

G.P. 12/6/95

B.L. We'd been ah, drinking quite a bit of liquor over the last few days.

G.P. And when you say "we", who you talking about?

B.L. The three of us was, been drinking quite a bit of liquor of the last few days.

G.P. Talking about Gary Barker and Mark,

B.L. Yeah.

G.P. Your brother?

B.L. Yeah.

G.P. Okay, go ahead.

B.L. Okay, we'd been, you know, drinking liquor over the last few days, you know. And then I get to where I drink so much I pass out, you know, black out and all that. So, you know, a lot of stuff, you know, is like, you know, I'd be at one place, we'd be drinking. So, you know, I'd pass out, and then

when I come to, be somewhere else, or we on the road or something, you know. And then tonight I'd went up with them, they picked me up up there coming down Prices Fork Road, in the little car, they pick me up, and then, going toward West Virginia. We's gonna go over in there, got some kin people live over there. I said, "Well hell, stop here and I'd get some beer."

G.P. And when you say "stop here" where was you talking about?

B.L. There's a store, leave right off 460.

G.P. Here in our county, Giles County?

B.L. I think so.

G.P. Okay, go ahead.

B.L. Okay, and then, and I said "Hell, stop here," you know "I'll get some beer." So then they said "Alright," you know, and I went in there, and I went back to the cooler, you know, where the beer was at, cause it was in the back. I went back to the cooler and the next thing I know, you know, here we come up in there and they got guns and shit, you know. And this old guy and old woman in there. The old woman had done run to the back of the store, and I told her, I said "Look, stay down" I said "god dam, stay down." I's going like this right here to them, I didn't know what the hell was going on myself, you know, I suppose to get some beer. And they come up in there running like that an shit, you know. I had a knife and I told them, I said "Look," you know, and I slung my knife and it stuck in the floor. And then I grabbed the knife and then I'd went up and then ah, Gary told me said, "Get that beer." I went like this right here, and the old guy, I seen it, he was sitting there at the dam, in between the counter and the wall and he hit it just

like this right here, I didn't see no blood or nothing, right. I didn't here [sic] no shots fired or nothing so I know they didn't shot him, but I didn't know if they hit him or not, right. So then I seen him like this right here, and he was going like this right here, you know, just shaking all to hell an shit, right. And then Gary told said, "Get that beer." I went like this right here and then it's, he's heading out the door, and then I seen the man in the door like this right here, you know, he was pointing the gun at me then. So then, you know, I picked up about six beers and I had, I think it was a five dollar bill in my hand, and then I laid it down right there.

G.P. You said Gary had the gun, what kind of gun did he have?

B.L. I'm not for sure what it was, I just know it was a pistol.

G.P. It was a pistol rather than a rifle shot gun he had?

B.L. Yeah.

G.P. What kind of finish did it have? Blue? Chrome? Stainless Steel?

B.L. Just blue finishing, you know, just a regular pistol, you know, it wasn't nothing . . .

G.P. Who's gun is that?

B.L. I don't know.

G.P. Had you seen it earlier that night, or?

B.L. Huh, uh, I hadn't seen that gun earlier that night, I seen the, I seen the rifle that he had had. And then ah, I'd seen it.

G.P. Okay.

B.L. And then ah, after that was over, I tried to get them to let me out, right. And then they came down to a place down here, the best I remember, it's next to a Dairy Queen, somewhere on the street where a Dairy Queen is.

G.P. That'd be in the town of Pembroke.

B.L. Yeah.

G.P. Are you familiar with Pembroke?

B.L. Not too much.

G.P. But you know that's where you were on the . . .

B.L. Yeah.

G.P. Okay, go ahead.

B.L. Cause I go by there a lot, you know, going, you know, my kin people, a lot of my kin people live over in Summer's County, and I travel 460. We's there at a store and I's trying to get out before we got to the store, I said "Man, let me the fuck outta here, let me the fuck outta here." I said "I ain't in all this crazy shit." I said, "Let me the fuck outta here." Alright, then they, they whipped up in there, and they said "Look, you take off, we gonna shoot you." you know. And you know, someone who's drunk an shit, hard to tell what the hell they've been on an shit, you know. I didn't wanna take no chances, I sat there, you know. And then they had me up front, and I's setting there, next thing I know here comes a gun man. Said "You drive." And Mark said "What a minute, hold up." He says "Drive it." you know.

G.P. Now who said that to you?

B.L. Ah, it was both of them. "You drive it." you know.

G.P. Who had the gun in their hand?

B.L. I think ah, I think Mark had the gun in his hand that time.

G.P. Okay, and what happened after that.

B.L. I drove, shit. And then we was going down next to a dam river, they said get down to the river. I said "Hold on." you know, I didn't know the way to the place they call the "Sand bar." But anyway, it was next to, you go by a railroad and all that shit. So then ah, we went down there and then ah, wasn't long after that we's pulled over and all.

G.P. Pulled over by the police or?

B.L. Yeah.

G.P. Then what happened at that point?

B.L. They had took off running and then when I got out, I was eating a granola bar, you know, they've done scared the hell outta me, you know, I was, I'm trying to get straight, you know, so then I's trying to eat something. And then they ran, and then a cop, you know, he made me stick my hands up and shit like that right there, and I soon as I got up there, man, they started sticking guns in my head an shit, you know. I hadn't had a gun in my hand, no pistol or nothing, except for that sixteen gauge, and they got to playing with that an shit. And I unloaded it, and there was one shell left in it, and I put it in my pocket to keep them from getting it earlier on that evening. You know, cause I don't, I don't like fucking nobody playing around me drunk with guns, you know. That shit don't go, alcohol and guns and fucking women and all that shit, that shit don't go, you know. And that's the only thing I done wrong since I've been out, is handle that one sixteen gauge pump shotgun.

G.P. So then, when the police stopped you, you they put you, or stopped you and detained you, or whatever they done.

B.L. Yeah.

G.P. And the other two ran?

B.L. Yes.

G.P. Do you remember what you told the officers there who those people were that ran?

B.L. Just Gary Barker, Mark Lilly, and Mike Raider. Cause he was in there earlier that evening.

G.P. So you told police it was four people counting you?

B.L. Yeah.

G.P. And three of them ran, even though there was two of you?

B.L. Two?

G.P. Two other than you. And you're saying and you're still saying there was four people that ran?

B.L. It was four of us, I can't rem., it might'a just been that two that ran. Because I can't remember exactly where he got out at. I don't know if it was right after that second place down next to the sand bar or what. But I remember he, he jumped out.

G.P. Was the fourth one with you when ya'll was over at the first store where the old man and woman were?

B.L. **\*\*No Statement Made\*\***

G.P. So there was four there?

B.L. Yeah.

G.P. Did he go, who all went into the store?

B.L. I went into the store to buy the beer, and I went back to the beer cooler, right. I was headed back that way, I didn't make it all the way back there, and I had money on me and all, and then the next thing I know, you know, he, they coming up in there with guns and shit. They done scared the hell outta both the old people and all that shit. I'm trying to tell the woman, you know, she's sitting there, and she's done turned white as a sheet, sitting there like this right here, said "Don't get up, don't get up." You know, I didn't want them to shoot either one of them. You know, "Don't get up, stay there, stay there." and all that shit. And then I told the, I hollered, told them "Ya'll get the fuck outta here." And then . . .

G.P. Now what was this about, you said you had a knife, what was the story on the knife?

B.L. Alright, I had a knife on me, I said "Stay here, stay here." I said "Don't get up and shit." And I had a knife on me and I pulled the knife out and I said "Ya'll get the fuck outta here." and I had the knife in my hands and then I threw it and it stuck in the floor on the first isle up. I said "Ya'll get the fuck outta here." and then I pull, picked the knife up, pulled it out, closed it up and put it back in my pocket. And I was going up there, then that's when Gary told said "Get that rest that beer." I said "No man." And I was looking over there and I seen the old guy he was just shaking, I didn't see no blood or nothing so I don't figure they hit him, he's just sitting down in between the counter and the wall. And then the next . . .

G.P. And what all did they take outta there other than the beer?

B.L. I think they got a little bit of beer and ah, I think they got some chewing tobacco and shit like that.

G.P. Did they get any money that you know of?

B.L. Not as I know of, I didn't see no, see I bought a case of beer right up there on at McCoy in ah, from ah, it's right before you get to, you know where the New River Junction Store is?

G.P. Uh huh.

B.L. Alright it's right before you get there, you know, before you go down hill and make a right. Alright, it was off of ah, I can't think of the name of the store but there's usually an old woman that runs it. I went in there and there was a heavy set girl tonight.

G.P. And you bought a case of beer there?

B.L. I bought a case of beer and two packs of cigarettes.

G.P. Was it pretty crowded in there when you were there?

B.L. Oh, no.

G.P. Any other customers?

B.L. Ah, no I didn't really pay attention.

G.P. The knife that you pulled out at Eggleston, is this the knife?

B.L. That's it.

G.P. Okay. And you pulled it out and told your partners to get outta there . . .

B.L. Yeah.

G.P. And then you threw it and stuck it in the floor, what was the purpose of throwing it and sticking it in the floor?

B.L. I tried to throw it at them.

G.P. Throw it at your partners?

B.L. Yeah, cause I didn't, you know, I don't play that shit man. Get up in there and fucking with old people like that, make them have a heart attack or somethin like. They fucking die, and shit you're getting a fucking murder charge and all kinds of shit. You ain't even suppose to be doing no shit like that to begin with, you know what I'm talking about?

G.P. So what was the original purpose of stopping at that store?

B.L. To get beer.

G.P. Even though ya'll had just stopped and bought a case of beer earlier?

B.L. Yeah, because we was getting ready to go across the state line and all to go in West Virginia. I said "Well hell, let me get some more beer, and then we'll have enough to do us till tomorrow."

G.P. So ya'll didn't discuss prior to that, let's go in there and rob this store?

B.L. Hell no.

G.P. And up to that point you didn't know that he had a pistol?

B.L. Huh uh. And then I'd say "Hell no." you know. That, if they would've been talking shit like that, I'd been, shit. I'd tried my damdest [sic] to got away from them.

G.P. What time did you get with Gary and Mark that day, yesterday?

B.L. Ah, maybe around seven or eight, something like that, nine or something.

G.P. In the morning?

B.L. No, in the evening is when I got back with them.

G.P. Was you with them earlier in the day?

B.L. Yeah, yesterday morning I was with them.

G.P. What were ya'll doing then?

B.L. Just drinking a little bit, drinking a little bit of liquor and all.

G.P. Were you riding around or were you at somebody's house?

B.L. We were ah, at ah, a couple of trailer courts, I can't remember their names or nothing.

G.P. How were ya'll getting from place to place that day, yesterday?

B.L. Okay yesterday ah, some guy in a tan van from Blacksburg gave us a ride, him and his girlfriend. I rode around with them looking for some kind of a pregnancy crisis place or something.

G.P. So the guy in a tan van and his girlfriend, you and Mark and Gary, ya'll just riding around.

B.L. We was looking for that place cause she had an appointment there and we was all in Blacksburg trying to find it.

G.P. And then what did they do, they drop you off somewhere, and you got back with them later that evening?

B.L. Yeah.

G.P. What time they drop you off that day?

B.L. Maybe around about one-thirty, two o'clock something like that.

G.P. And then what time did you get back with them?

B.L. It was around about, maybe seven or eight.

G.P. Where'd they pick you up?

B.L. It's was on ah, prices Fork Road.

G.P. At a residence?

B.L. No, I was hitchhiking.

G.P. They just come by and see you?

B.L. Yeah.

G.P. What were they driving them?

B.L. Some kind of little maroon car.

G.P. And then from there, that's when ya'll, who's car was it?

B.L. I'm not for sure.

G.P. You didn't ask them or anything?

B.L. No.

G.P. You ever seen it before?

B.L. Huh uh. But hell, them two boys they don't shit, they fucking buy a car every other day or something. Shit they give a hundred dollars for a car and then run the hell out of it, you know. I just figured they just wanted to ride, you know.

G.P. Did you end up with any of the money out of the first robbery over where the old couple were?

B.L. No.

G.P. They didn't give you money whatsoever?

B.L. No. Number one I wasn't trying to be involved, you know. I just got out on parole. Course now . . .

G.P. You and Gary get along pretty good, or you and your brother get along pretty good?

B.L. Me and Gary get along alright. Me and my brother, you know it's, we're about ten years difference in the age and, you know, sometimes we get along, sometimes we don't, you know. But ah, if I wasn't (not understandable) all this shit I believe I'd been better off, I would've waited there with them two old people till the police got there, you know what I'm saying. Them fella's riding around with them earlier, God Dam, you know.

G.P. When you came into Giles, they picked you up hitchhiking and ya'll rode into Giles, who was driving the red car?

B.L. I'm thinking Mark was.

G.P. And who would've been up front passenger side?

B.L. Gary.

G.P. And you got into the back?

B.L. Yeah.

G.P. And when you left the first store over there, who was driving them?

B.L. Ah, Gary.

G.P. And you were in the back?

B.L. Yeah.

G.P. And then Mark was a passenger?

B.L. Yeah. See what happened, I jumped in the back, because then they kept hollering "Come on, an come on." And I was up there and I wanted to stay and make sure that they wasn't, you know, hurt or nothing. I was up there at the counter, Gary told

me, said "Get the beer." I went like this right here, nodding my head, no. Next thing I know, you know, they still standing there dam guns waving and shit, you know. I didn't know if they was gonna shoot me or not, I grabbed six beers and I had some money in my hand the I dropped it on the counter.

G.P. When ya'll left that area and you went to the second store, what was the purpose of stopping at the second store?

B.L. I'm not for sure, I was trying to get away from them.

G.P. Were they, had they discussed going in there and robbing it?

B.L. They didn't say a word, and then they'd stop, and then I was trying to figure out how the hell to get away from them. And there was two or three vehicles out there, there was trucks and shit I didn't think they was gonna do no crazy shit like that. All them vehicles and all, and I was trying to figure out how the hell to get away from them.

G.P. So them two went in a store, left you in the car . . .

B.L. Yeah. And then when they came back out then these, I got a fucking gun in my ears, you know.

G.P. And they told you to drive on?

B.L. Yeah.

G.P. As you was driving down back down toward the river road, you remember a shot being fired, or a car chasing you?

B.L. I remember somebody said, the car was chasing, getting away from them, and I wasn't, I was trying, you know.

G.P. You don't remember hearing a shot, though?

B.L. I was too dam scared.

G.P. Okay.

B.L. To be honest with you, I was too dam scared.

G.P. And just on down the road a little short piece where a car, where the police officers came up on you, you tell me that you stopped or did the car break down on you?

B.L. It had broke down.

G.P. Just plain quit running?

B.L. Yeah. Over heated or somethin.

G.P. What were ya'll doing at that time? Were you getting outta the car, were you just gonna stay with it, or?

B.L. I was sitting there, didn't know what the hell to do, and then about the time it broke down then the cop pulled up.

G.P. You got outta the car?

B.L. Yeah, I was getting out.

G.P. You were driving it that time?

B.L. Yeah.

G.P. Did you bring a shotgun out with you and then place it back in the car when you saw the officer?

B.L. No.

G.P. So if the officer said that when you got outta the car,

B.L. No ah, Gary grabbed the rifle, and I was saying "Wait a minute," I said "Man, that's a policeman

and I setting here in a, unlicensed". Then the police hollering "Get the hell outta the mother fucker, get the hell outta that car mother fucker." And then I was eating a dam granola bar, and then when I got out then they fucking put guns to head and shit. And I told them, I said "Look man, I'm just eating something." I put my hands up like this right here, and then he said "Come here." I started going up there to where the lights was on the vehicle, and I started to get down, you know, to where the lights was, they said "No, I said come here." And then when I got there, then they slammed me to the ground, and I had all kinds of guns around my head.

G.P. The, was there a shotgun in the front seat where you were when you stopped and the police apprehended you?

B.L. I can't remember for sure, I can't remember, sir.

G.P. Anything else you wanna tell me?

B.L. No, I can't think of nothing.

G.P. Okay, interview will, let me ask you, have you at any time today fired a weapon or fired any, either the rifle, the pistol, or the shotgun?

B.L. No.

G.P. You didn't fire at anything today?

B.L. Huh uh.

G.P. Okay, interview will end at 4:17.

Transcribed by:

Christy Cumbee

## [239] Testimony of Gary Ray Price/Direct

A. He signed a written form, yes, sir.

Q. So, he was filling parts of it out as you were asking him those questions?

A. The only writing he would have done would have been the, where he put his signature at the bottom.

Q. All right. Now, you asked him if he fired a gun right at the end?

A. Yes, sir, I did.

Q. And after the tape was off, did you ask him to do anything or to check something about firing a gun?

A. I asked him if he would submit to a GSR Kit performed by the evidence tech to recover any powder residue that would have been on his hands.

Q. Okay.

A. The firing of any weapons normally leaves some powder residue on your hands.

Q. All right. Now, what do you mean by GSR What does that stand for?

A. Gun shot residue.

Q. So, you would of had the evidence tech [240] come in?

A. Yes, sir. He would have conducted the test necessary to recover the residue.

Q. And when you asked Benjamin Lilly that, what did he do?

A. Mr. Lilly was handcuffed during the interview for the safety of, of the officer. Mr. Lilly begin rubbing his hands in this manner right here (describing with hands).

Q. Had he been doing that before?

A. I had not noticed him, no, sir.

Q. Now, Mr. Lilly you talked to I believe beginning about 3:55 in the morning or thereabouts? Whatever you indicated on the tape?

A. At 3:55 a.m.

Q. Let me go back to the scene now where the vehicle was found and you came in contact with Mr. Lilly. How much longer did you stay at the scene?

A. After Mr. Lilly was placed in the police car, probably ten to twenty minutes, within ten to twenty minutes, a second subject was located and brought to a

\* \* \*

[249] him it was a voluntary test? That he didn't have to take it?

A. My words would have been, would you submit, which would been voluntary.

MR. TUCK: Your Honor, if I might have a moment or draw your attention to the preliminary hearing that occurred on, back in February.

THE COURT: Let Mr. Price see a copy of that transcript that you're referring to.

Q. Page 74 for the prosecutor it would be along lines 13, 12, 13. Does that refresh your recollection?

A. Would you like for me to read it or just read refer -

Q. Just simply read it to yourself and see if that refreshes your recollection.

A. Okay.

Q. All right. Now, did you indicate to Mr. Lilly that the test would be voluntary?

A. According to my testimony at the preliminary, I indicated to him it would have been [250] voluntary.

Q. Okay. And was your memory better back in February than it was in December, I mean, than it is today? Was your memory better in February than it is today?

A. It would be, but I'm -

Q. Okay.

A. Of the same answer, I'm sorry.

Q. No, you could have taken Mr. Lilly to the magistrate and gotten a search warrant to check his hands, is that correct?

A. That was an option I would have had, yes.

Q. And you didn't exercise that option, is that correct?

A. That's correct.

Q. You also took gun residue tests from both Mark Lilly and Gary Barker, is that correct?

A. They were asked during their interviews if they would also submit to a GSR Test.

Q. And they agreed. And they, the tests were taken. Were they ever sent off for results?

\* \* \*

[265] that point?

A. Yes, sir, I was still moving then I pulled my patrol car cross ways in the road -

Q. All right.

A. And stopped.

Q. Did you see any persons around the vehicle?

A. Yes, air, two (2). The one (1) in the back and the driver, they jumped out of the vehicle and ran towards the rear of the vehicle.

Q. All right.

A. And the one (1) on the passenger's side exited the passenger's side of the vehicle.

Q. Okay. And then what happened?

A. He had, ah, it was a shotgun that appeared -

Q. Okay. Now, by he, who do you mean by he?

A. Ah, Mr. Lilly, Mr. Ben Lilly.

Q. All right. The gentlemn [sic] over there in the middle?

A. Yes, sir.

[266] Q. And where did he come from?

A. He came out of the passenger's side front seat of the vehicle.

Q. All right. And then what happened?

A. He had the shotgun in his hands and he turned towards me and that's when I ordered him to put the shotgun down.

Q. And how did, how was he holding it?

A. He was holding it. He didn't have it up to shoulder. He just had it in his hands like that (describing).

Q. Sort of across?

A. Yes, sir.

Q. And you ordered him to place it down?

A. Yes, sir, I did.

Q. Did you -

A. Probably two (2) or three (3) times, I told him to put the shotgun down and he laid it back onto the front seat of the vehicle.

Q. All right. Was there, the door open at that point?

\* \* \*

[359] Testimony of Robert E. Fleet/Direct

Q. And on -

A. He may have, but I, I can't remember that.

Q. That's all right. And on that occasion what did you do?

A. We conducted a search of the area around the body scene and the crime scene.

Q. All right. Did you locate anything -

A. We did. We, I located Item Twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26).

Q. All right. I believe those are eye glasses. Two (2) parts of the frames and two (2) lenses?

A. That's correct and a money clip.

Q. I show you Commonwealth's Exhibits Seven (7) (a) through (d) where they had been marked by you, is that correct?

A. That's correct.

Q. With the distances they were found from the relative position of the body?

A. That's correct.

Q. I believe when you went there on the 15th

\* \* \*

[365] Q. And that photograph?

A. This photograph shows partial frame. It's also south of the body in the edges, in the mud puddle that is frozen or partially frozen. Again, that was on the 15th. That's south of the body.

Q. All right. Is that part of one (1) of the frames also or is it -

A. I believe it is.

Q. And in terms of, approximately where would it have been on that photograph?

A. You had to ask me that, didn't you? Ah, it's in this area here. I cannot seem to pinpoint it exactly in this photograph, but it was in this area right in here.

Q. All right. And from the other view?

A. This is the mud puddle. The lenses and the glasses would have been up in this area here.

Q. And I believe you also located something else that day?

A. I did. I located a money clip that was south of the body, ah, east of the mud puddle in the [366] grass area. Actually, what happened was, I kicked it up out of the snow. I didn't know what it was and picked it up.

Q. Was it just a clip itself or was it attached to anything?

A. There was a, a clip and it had an Indian head penny in it.

Q. All right. Did it have this black -

A. Yes, it had a black felt thing on it.

Q. All right. And examine that and be sure that's the one you found?

A. That is the one I found, 1890, ah, penny in it, a horseshoe clip.

Q. All right. And I believe for the record that's been identified by Mr. Sanders from Floyd as belonging to him -

A. He did.

Q. And having been taken from his house? Could you show us approximately where on that, if you can -

A. It's not actually in this photograph.

\* \* \*

[481] A. Yes, that is correct.

Q. And I believe it was Deputy Buckland who provided you with items removed from Benjamin Lilly?

A. Yes.

Q. And would you tell the Court what those items were, please?

A. A brown Ziplock baggie containing smoking tobacco. An unopened pack of basic brand cigarettes. Assorted personal papers. A comb. Assorted keys. A nylon camouflage truffle wallet, which contained Ninety Five (\$95.00) Dollars in currency and assorted other papers that are normally found in a wallet. A beaded type leather necklace. A key ring with a 1906 Indian head penny insert. A 1945 dime in a coin protector. A 1992 silver dollar. A 1982 George Washington Commemorative half dollar, also in a protective case. Two (2) disposable lighters. A nail clipper and eighteen (.18¢) cents in change.

Q. All right. And are those items still in your possession as your Item Number Ten (10)?

A. Ah, several of the items are. I, ah,

\* \* \*

[487] A. Yes, I did.

Q. And where was that done?

A. At the Giles County Sheriff's Department.

Q. And were the dabs made?

A. Yes, they were.

Q. And were they sent?

A. No, they were not.

Q. Did the, Investigator Price ask you to come to a room where he and Ben Lilly were?

A. Yes, he did.

Q. And were you present when the investigator asked if Mr. Lilly would allow the GSR to be done?

A. Yes, I was standing just outside the door to the, ah, the open door to the interview room.

Q. And was Mr. Lilly at that time restrained in any way?

A. Yes, he had on handcuffs.

Q. Front handcuffs?

A. In front, yes.

Q. And what did he do physically, if anything, after investigator Price asked if he'd take the [488] test?

A. Okay. He, ah, declined the test and started rubbing his hands together and (describing).

Q. Would you raise them up? Is that how he was doing them?

A. (Describing) Ah, a manner similar to this, Yes.

Q. And did you have anything to do with transferring Mr. Lilly from that interview room?

A. Yes. Lieutenant Price asked me to escort, ah, Mr. Lilly to the magistrate's office, which is downstairs from our offices, which I did.

Q. And did you notice if Mr. Lilly was doing anything with his hands then?

A. Yes, he was still rubbing his hands together and also I saw him rub his pants legs with his hand.

Q. In what area?

A. On his -

Q. Not his pants legs, but of his hands?

A. The palms, fingers, the, ah, you know, the [489] whole area.

Q. Are you aware of anything that would interfere or invalidate a GSR Test?

A. Gun shot residue particles are very fragile. They're, they're easily washed away. They can be washed away. They can be rubbed off very easily. Ah, you know, they're just, you know, they're very unstable I guess as far as being able to remain on a surface, ah.

Q. All right. Thank you. Deputy Skidmore, if you could just leave Item Ton (10) up there for possible later use, I'd appreciate it and then answer any questions Mr. Jenkins may have.

THE COURT: Mr. Jenkins.

## CROSS-EXAMINATION

BY MR. JENKINS:

Q. Officer Skidmore, I have some questions that I would first of all like to ask you about the gun residue test, okay?

A. Okay.

Q. Now, when Deputy Price talked to Mr. Lilly, didn't he indicate to him that that was a

\* \* \*

[534] There was a graze wound next to the entrance wound where the bullet grazed the lip, entered the lip, passed across the lip and exited the other side. Ah, a little bit of bruising on the inside of the lip, no teeth were fractured or missing. No bullet was recovered. Wound Number Two (2) was located at the angle of the left jaw, just below the lobe of the left ear, in this region (pointing). This wound was oblique and it was oriented backward. There was no, no gun shot residue incidentally around any of these wounds on the skin. The bullet passed backward through the soft tissue by the jaw and exited the back tissue of the soft tissue of the back of the neck. This bullet struck no vital structures and was not a lethal wound. No bullet was recovered. Wound Number Three (3) was located in the right temporal area just above the right ear and at this point (pointing). This wound was surrounded by a small amount of bruising. Ah, the wound path was from right to left and horizontal. The bullet passed through the brain, both halves of the brain, and was recovered beneath the left temporal bone in this region (pointing). This bullet was a lead alloy

\* \* \*

[536] and two feet away?

A. No. Greater than that distance.

Q. Oh, -

A. How much greater, I can't say.

Q. So, it would be somewhere beyond two feet?

A. Yes, sir.

Q. Now, you indicated, ah, that there was bruising around the one in the right forehead -

A. In the right temporal.

Q. The right temporal. And what does that indicate?

A. Nothing. It's a nonspecific finding.

Q. Did it indicate, did the examination of the body indicate that there had been bleeding -

A. There had been bleeding, yes, from all of the wounds.

Q. Now, can you tell the Court the wound to the lip. There was a slight graze and then it passed through. What kind of effect would that have on a person if they were hit by that kind of shot?

A. It would be painful, but not disabling.

\* \* \*

## [569] Testimony of Patricia Taylor/Direct

A. The clothing from Benjamin Lilly consisted of two (2) socks, a belt, underpants, T-shirt, shirt and over-shirt and jeans.

Q. Did your examination indicate whether or not there was anything that appeared to be blood on it?

A. Yes, it does.

Q. And where was that?

A. Test indicated the presence of blood on the bottom right leg of the blue jeans.

Q. Okay. Front, back, side, inside, do you remember?

A. on the outside back at the bottom of the right leg.

Q. Now, you first noticed this spot with your visual examination? Correct?

A. That is correct.

Q. And then you do the presumptive test?

A. That is correct.

Q. And what is that exactly?

A. This is a chemical test that will give me a positive reaction with blood.

\* \* \*

[566] A. That is correct.

Q. And what would a hair and fiber examination have produced?

A. With regards to the hairs and fibers that I recovered from these various items of clothing they could be compared to the hair standards from the individuals.

Q. So, you could tell if they had been in contact or the same vehicle as another person?

A. It may yield that information through the examination.

Q. All right. Thank you, Ms. Taylor.

THE COURT: Thank you, Mr. Schwab. Mr. Tuck.

## CROSS-EXAMINATION

BY MR. TUCK:

Q. I believe you indicated that you did find some blood on Benjamin Lilly's pants. It was on the back right portion of his jeans, is that correct? Back bottom portion?

A. That is correct.

[577] Q. Okay. So, it was on the back side of his jeans then?

A. That is correct.

Q. Were you able to amplify that? I didn't hear that, the, and he may have asked you that question. Were you able to amplify that blood that we're, that you found on the back of those pants?

A. No, no amplification results were obtained with that particular sample.

Q. Based on what you know about this situation, can you testify whether that's Benjamin Lilly's blood, and there, just so you'll know, there's been evidence that there was a goose that was killed and I'm going to show the witness Exhibit Eleven (11), blood on the back of the car, or a reddish material appearing on the back of the car and a dead goose. Can you tell us whether that blood came from that goose or can you tell us where that blood came from? Whose blood that is?

A. No, I cannot based upon my testing.

Q. Okay. Now, you indicated that on, in your report on October the lot, the request for examinations [578] of Seven (7) and Seven (7) (a) were terminated and can you tell me why they were terminated? Seven (7) and Seven (7) (a) being Gary Barker's clothing and shoes.

A. It was -

Q. Perhaps I can show you.

A. It's, it was my understanding that at that time, ah, the proceedings with regard to Gary Barker were completed.

Q. Okay. You had not done any blood testing on Gary Barker's clothes in August had you?

A. No, I had not.

Q. And, an a matter of fact, the clothing was not tested until, when in October was Gary Barker's clothing testified, tested? Tested, excuse me.

A. It was at the beginning of October.

Q. First week of October or the second week of October, if you recall?

A. I don't recall.

Q. Okay. Do you, did you have to work weekends to get that completed?

A. Yes, I did.

[579] Q. Okay. Did, was there any indications of why this had to be done?

A. I don't recall specifically.

Q. Do you recall generally why it had to be done? Why you had to work weekends?

A. Just to complete the testing.

MR. TUCK: Your Honor, if I might have a moment.

THE COURT: All right, sir.

MR. TUCK: Your Honor, no further questions for this witness.

THE COURT: All right. Thank you, Mr. Tuck. Mr. Schwab, any questions on redirect?

MR. SCHWAB: Yes.

#### REDIRECT EXAMINATION

BY MR. SCHWAB:

Q. Now, when you did the spot found on the back of Ben Lilly's pants, was this a large stain or a small stain?

A. It was a very small stain.

Q. You did the presumptive test?

[580] A. Yes.

Q. Did you do the species testing?

A. No, I did not.

Q. Why not?

A. If I had done the species testing on this particular stain it would have consumed it and I would not have been able to even try the DNA testing.

Q. So, at that point, you were simply attempting to find what you could from that spot?

A. That is correct.

Q. And, of course, you can't say whether it came from a goose or a person?

A. That is correct.

Q. All right. Is there anyone else that does this at the Western Laboratory, or Western District Laboratory?

A. Yes.

Q. And do you have a backlog of cases?

A. Yes.

Q. Do you have any kind of priority system?

A. Basically, if there's a Court date set

\* \* \*

[586] God?

MR. BARKER: Yes, sir.

THE COURT: Thank you, Mr. Barker. If you'll have a seat there and you'll be asked questions on behalf of the Commonwealth and questions on behalf of the defense, and if you will answer those questions, please. Mr. Schwab.

GARY WAYNE BARKER,

A WITNESS OF LAWFUL AGE, AFTER FIRST BEING DULY SWEORN, DEPOSED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. SCHWABB:

Q. Will you tell the jury your full name, please?

A. Gary Wayne Barker.

Q. And how old are you, Gary?

A. Twenty (20).

Q. And how old were you in December of 1995?

A. Nineteen (19).

Q. Do you know someone by the name of Mark Lilly?

[587] A. Yes, sir.

Q. And who is he? if you'd tell the jury, please.

A. Ben Lilly's younger brother.

Q. And how long, do you know Mark, or did you know him before December?

A. Yes, I've known Mark a long time.

Q. And did you know Benjamin Lilly?

A. Ah, not as good as I did Mark, but I know him.

Q. How long had you known Ben?

A. Ah, I don't know. Ah, a couple of months before it happened, I guess. A month or so, I'm not sure.

Q. All right. Now, Gary, you were charged with essentially the same offenses, eight (8), I believe?

A. Yes, sir.

Q. And you've had your Court date?

A. Yes, sir.

Q. That was August the 26th of this year?

A. I believe so.

[588] Q. And you plead guilty, is that correct?

A. Yes, sir.

Q. And there was a plea agreement entered into?

A. Yes, sir.

Q. I'm going to show you this document. Look over it, please.

A. (Mr. Barker reviewing document). It's the same as what I had.

Q. All right. And is it the copy of your signature on there?

A. Yes, sir.

Q. In that your signature?

A. Yes, sir.

Q. All right. Ours is certified, so I hope that is a -

MR. TUCK: Mine is too.

MR. SCHWAB: Good.

Q. Now, I'm sure you haven't seen this, have you?

A. Ah, no, I don't believe so.

[589] Q. All right. Now, you came to Court on the 26th, is that correct?

A. Yes, sir.

Q. Of August. And you plead guilty to each charge?

A. Yes, sir.

Q. And do you recall what the agreement was?

A. Ah, to give true testimony against Benjamin Lilly.

Q. And what did the Commonwealth promise you?

A. Ah, huh, not a whole lot of anything really. A chance of maybe one day of getting out.

Q. And what was your sentence?

A. Fifty-three (53) years.

Q. On December the 5th, when before that date had you been with Mark?

A. Excuse me.

Q. Before the 5th, how long had you been with Mark Lilly before the 5th of December of 1995?

A. Ah, a few days.

Q. Where did you live at that time?

[590] A. Ah, in Merrimac.

Q. And where was Mark living?

A. He was staying there with me and this other guy.

Q. And who was the other guy?

A. A. J. That's all I know him by.

Q. And did you have a car?

A. No, sir.

Q. Did Mark have a vehicle?

A. No, sir.

Q. Were you working at the time?

A. Ah, half and half, huh.

Q. How about Mark?

A. No.

Q. And where was Ben staying?

A. Ah, at his mother's.

Q. And where was that?

A. In Riner.

Q. In sometime or before of December the 5th, did you and Mark meet up with Ben?

A. Yes, sir.

[591] Q. And how did that happen?

A. Ah, we was, ah, went over to Mark's place and got with Ben and decided we was going to ride around a little bit because he had a car.

Q. So, you, how did you get out to Riner?

A. Ah, my aunt had took us.

Q. You and Mark?

A. Yes.

Q. And you met Ben there?

A. Yes.

Q. And what kind of vehicle did they have, or did you have?

A. He, he had, ah, ah, big, ah, Mercury Cougar, an older type.

Q. Was it working when you got there?

A. Yeah, half and half (laughing).

Q. I show you Commonwealth's Exhibit Number Number [sic] Two (2). A photograph of a vehicle in front of a convenience store. Is that the car?

A. Yes, sir.

Q. And you recall what day of the week this [592] was that you got together with Ben and Mark?

A. Ah, I, I believe, I'm not positive, I believe it was on a Sunday. Sunday evening, I guess.

Q. And what did you do that day?

A. Ah, drink a little, smoke a little.

Q. And by smoke a little, what do you mean?

A. Pot and

Q. Now, did there come a time when you ended up in Floyd County?

A. Yeah.

Q. Was that the same day or the next day?

A. That was the same day.

Q. And you went out there, where were you going? Anywhere in particular?

A. Ah, to, ah, Danny Sanders, Saunders.

Q. And how did you know him?

A. Me and Mark had drank with him. Parties with him a little bit.

Q. He knew your mother, I believe?

A. Yes. Yes, sir.

Q. You'd been there before?

[593] A. Yes, sir.

Q. Do you know if he had any liquor in the house?

A. Yeah, he always had liquor.

Q. And where did he keep it?

A. Ah, in his, he's got a home bar.

Q. Did he have any firearms?,

A. Ah, yeah.

Q. What kinds?

A. A .35 caliber rifle, a .38 caliber pistol and a 16 gauge shotgun.

Q. Now, did you know those guns were at his house?

A. Yes, sir.

Q. Had you seen them before?

A. I had seen the pistol and the rifle.

Q. Had Mark been to the home before?

A. Yes, sir.

Q. Do you know if held seen the weapons?

A. Yes, sir.

Q. Had Ben ever been there before?

[594] A. No, sir.

Q. So, how did you end up at Mr. Sanders or Mr. Saunders?

A. We just drove up there and was going to drink a little bit with him and he wasn't there and we decided just to go on in and help ourselves.

Q. And how did you go in?

- A. Busted out the front glass in the door.
- Q. And went inside?
- A. Yes, sir.
- Q. Did you all stay there for a while?
- A. Nah, we was in and out pretty quick.
- Q. All right. Did you take anything while you were there?
- A. Yeah.
- Q. What did you take?
- A. Nine (9) liters of liquor and three (3) guns.
- Q. Different kinds of
- A. Yeah.
- Q. Liquor?
- [595] A. Yes, sir.
- Q. Were most of them full or
- A. Yeah, they was all full.
- Q. And the guns?
- A. Ah, all of them had a few shells in them.
- Q. Okay. Was anything else taken besides the guns and the liquor?
- A. A safe.
- Q. Where did that come from?
- A. Ah, behind his bar.

- Q. What kind was it?
- A. Ah, it was, I guess like a fireproof safe
- Q. What was it made out of, if you know?
- A. Ah, I'm not sure.
- Q. Okay. And what did you do with those items after you took them?
- A. Ah, we was, we was drinking liquor and the safe, ah, we got into it and it wasn't anything worthwhile in it.
- Q. Now, where did you take the safe to get into it?
- [596] A. Ah, to Mark's sister's.
- Q. Was she home at the time?
- A. No, sir.
- Q. And what did you do with it there?
- A. Took a splitting mall and busted it open.
- Q. And did it come open?
- A. Yes, sir.
- Q. Was there anything in it?
- A. Yes, sir.
- Q. What kinds of things were in it? Do you remember?
- A. Ah, car titles, ah, old money, old stamps
- Q. Were there any knives in it?

A. Ah, I believe there might have been. I'm not sure, I'm not positive.

Q. Now, after you split it, had opened it, what did you do with the things inside?

A. Ah, well, anything that was worth keeping we split up and the rest of it we threw in, ah, in, ah, like a creek.

Q. All right. Now, was it daylight or dark [597] when you got there?

A. It was dark.

Q. Did you go anywhere else from there?

A. Ah, we went to Blacksburg.

Q. Do you recall going to Radford at anytime that first night?

A. Yes, I do. We went to, ah, Warren Nolen's.

Q. Now, were the three (3) of you still altogether?

A. Yes, sir.

Q. You're still in Ben's car?

A. Yes, sir.

Q. Who was driving at that point?

A. Ah, at that point, Mark was driving.

Q. All right. And had any of the liquor been opened at that point?

A. Yeah, all of it had been opened.

Q. So, you went to Radford. Did you know Mr. Nolen?

A. No, I didn't.

[598] Q. Did you know Ms. Quesenberry that lived there also?

A. No, I mean I met them that night, but I didn't know them before.

Q. Okay. And you all got there and what happened after you got there?

A. Ah, we drink a little bit and tried to trade the guns for some dope and, ah, they didn't have enough, so they burnt a little bit with us and then we left.

Q. And what do you mean, burned a little bit with us?

A. Ah, we smoked a little of pot and then we left.

Q. All right. Did they ever ask you to take the guns outside, or do anything with the guns?

A. Ah, his, ah, that lady there didn't want us, want them around him because he had, Warren had got out of the penitentiary and she didn't want no guns around him.

Q. So, did you all do anything with the guns?

[599] A. Ah, we laid them down until we was ready to leave in the corner.

Q. Do you remember doing anything with the things from the safe while you were there?

- A. Yeah, we tried to sell a little bit of the stuff.
- Q. The coins or whatever?
- A. Yeah, the coins and the stamps.
- Q. Did you sell any?
- A. Ah, not that I remember.
- Q. All right. Where did you all go from there?
- A. Ah, to Blacksburg. Back to A. J.'s.
- Q. And who went back to A. J.'s?
- A. Me, Mark and Ben.
- Q. And what happened when you got there?
- A. Ah, we drank, and drunk, that's about it. We sat and drank.
- Q. And where did you spend the night that night?
- A. A. J.'s.
- [600] Q. And how late did you drink, if you know?
- A. Ah, I don't, 2 or 3 o'clock in the morning.
- Q. Now, Mark's about your age, right?
- A. Yes, sir.
- Q. Maybe a little older?
- A. Yeah, he's a year older.
- Q. And did everybody stay there at the trailer?
- A. Yeah, me, Mark, Ben and A. J.

- Q. And then what happened in the morning?
- A. Ah, we got up and started drinking some more.
- Q. How much did you have left at that point?
- A. Ah, probably two and a half (2-1/2), three (3) fifths all total.
- Q. You drank that much before of the other eight (8) or nine (9) bottles? That's all you had left?
- A. Yeah.
- Q. Did anybody else drink with you other than - [601]
- A. Yeah.
- Q. The three (3)?
- A. We all, it was me, Mark, Ben and A. J., ah, but he didn't drink with us the next morning though.
- Q. And what did you all do the next morning?
- A. Ah, we rode around, rode back roads in the Shawsville, Elliston area.
- Q. Okay. Did you have your alcohol with you?
- A. Yes, what we had left of it.
- Q. Were you drinking?
- A. Yes.
- Q. And did you stop any place down in the Shawsville area?
- A. Yeah, we stopped at a store.
- Q. And what kind of store?

- A. Ah, it's a little small store.
- Q. And what did you do there?
- A. Ah, stole a tank of gas.
- Q. And by stole a tank of gas, you mean
- A. Just pumped and left.
- Q. Who was driving?
- [602] A. I was.
- Q. Were Ben and Mark with you?
- A. Yes, sir.
- Q. You went on from there, did you stop anywhere else in the area, not where there was a business or a house, it was just some place to stop, and do anything else?
- A. Yeah, we went down in, ah, ah, Shawsville down in Boner's Run.
- Q. Okay. And what did you do there?
- A. Ah, I fired the rifle and Mark fired a pistol and then Ben fired it and then we rode around some more and drank some more. Just fired it into a tree.
- Q. Now, by the rifle, I show you this. Is this the rifle he fired?
- A. Yes, sir.
- Q. And this, and where did this come from?
- A. Danny, Denny's.

- Q. And how many times did you fire it?
- A. Fired it once down there, probably a total of three (3) times altogether before the night was out.
- [603] Q. And who fired the pistol there?
- A. Ah, Mark and Ben.
- Q. And what did they shoot at?
- A. Just the tree.
- Q. Now, how many rounds of ammunition did you have for the rifle?
- A. Ah, at least five (5).
- Q. And do you know how much there was for the pistol?
- A. Ah, yeah, it was, ah, it was fully loaded.
- Q. So, there were six (6)?
- A. Yeah, or eight (8), whatever, how many ever it holds. I don't remember.
- Q. Do you know if you found a bullet some place else?
- A. Yeah, there was a, a silver one at A. J.'s and we picked it up too.
- Q. Now, was that the only time you fired
- A. No.
- Q. The guns in that area of the county?
- A. No. We went down to Alleghany.

[604] Q. Okay. And what happened there?

A. Ah, the shotgun got fired and the rifle got fired.

Q. Were they fired at anything in particular?

A. Yeah, at some goose, geese.

Q. And where were they?

A. At, in this church yard.

Q. And what did you fire?

A. I fired the rifle again.

Q. And do you know who fired the shotgun?

A. I'm pretty sure Mark did.

Q. Did you have either or both of the geese?

A. Ah, one (1) of them was flopping, it got away, but the other one (1) died.

Q. And what did you do after it died?

A. Ah, threw it up in the trunk.

Q. Do you know who carried it to the trunk?

A. I don't remember.

Q. I show you Commonwealth's Exhibit Number Eleven (11), the trunk, a photograph of a trunk with it open with a goose in it. Is that the goose that was [605] killed and placed in the trunk?

A. Yes, sir.

Q. Do you recall about what time of day that was?

A. No, sir.

Q. Was it light?

A. Yeah, it was still light out, yeah, for sure.

Q. So, you had the goose, you had a full tank of gas by that time, right?

A. Yes, sir.

Q. Where did you go from there?

A. Ah, rode some more back roads.

Q. And where did you end up?

A. Ah, we went to a trailer park, ah, across from the, ah, the rock quarry in Blacksburg.

Q. Did you go there to see anybody in particular?

A. Yes, sir.

Q. And who did you go to see?

A. Ah, Billy Roop.

[606] Q. You all three (3) were still together at that point?

A. Yes, sir.

Q. Where were the guns at that point?

A. In the car.

Q. And what did you do at that trailer park?

A. Ah, tried to trade a pistol, for some dope.

Q. With?

- A. Excuse me.
- Q. Who did you try to trade it with?
- A. Billy.
- Q. You didn't make the trade?
- A. Ah, no.
- Q. Okay. Did you stay in the trailer park long after that?
- A. Ah, yeah, we went by, ah, two (2) more trailers.
- Q. And what were you doing there?
- A. Ah, basically, looking for some dope.
- Q. Did you all three (3) end up leaving the trailer park?
- [607] A. Yes.
- Q. How much later did you leave?
- A. We was probably there, I don't know, around, around about an hour just give or take a few minutes.
- Q. Were you drinking during that time?
- A. Yes.
- Q. And where did you go from there?
- A. Ah, riding around again.
- Q. And where did you go after that, if you remember?
- A. Ah, we went to Cowboys.

- Q. Now, what's Cowboys?
- A. It's a bar in Blacksburg.
- Q. Is that near Hokie Honda or behind Hokie Honda?
- A. Yes, it's behind Hokie Honda.
- Q. And all three (3) of you together then?
- A. Yes, sir.
- Q. And what did you do there?
- A. Ah, me and Ben got out of the car and, ah, [608] and, ah, a guy got in the car with Mark talking, trying to score some dope.
- Q. Now, did you ever have those, any of the guns out there?
- A. Yeah, I -
- Q. Which guns?
- A. Ah, I know for sure the rifle was. I don't remember if the pistol or the shotgun was, but I know the rifle was.
- Q. And who had that out?
- A. I did.
- Q. And what did you get it out for?
- A. Ah, I was trying to sell it.
- Q. And what did you do with it after you got it out?
- A. I showed it to, ah, Michael Hixon and then I put it back.

Q. How long did you stay there?

A. Ah, I don't know. Twenty (20) or thirty (30) minutes, it wasn't long.

Q. Did you all buy anything at the bar?

[609] A. No.

Q. And where did you go from there?

A. Ah, through Merri -, we went through Merrimac.

Q. All three (3) of you still together?

A. Yes.

Q. Who was driving?

A. I was.

Q. Where was everybody else?

A. Ah, Ben was in the middle and Mark was in the passenger, beside the door.

Q. All in the front seat?

A. Yeah.

Q. Do you know where the guns were then?

A. Yeah, I had the rifle wedged between the seat and the door and, ah, the shotgun was in the floorboard and, ah, I don't remember, one (1) of them had the pistol laying in the seat with them.

Q. All right. You went through Merrimac, correct?  
After Cowboys -

A. Yeah.

[610] Q. You were driving. Was it getting dark by that point?

A. Yeah.

Q. And when you came out of Merrimac, where did you come out?

A. Ah, on Price's Fork.

Q. All right. And where did you go after you got on Price's Fork?

A. Up to where the car tore up.

Q. Were you going into Blacksburg or away from Blacksburg?

A. Yeah, we was going into Blacksburg.

Q. Where were you going at that point in time?

A. University.

Q. University Trailer Park?

A. Yes, sir.

Q. And what were you going there for?

A. The same thing we was at the other trailer park, looking for some dope.

Q. And what happened as you were going along [611] Price's Fork Road?

A. Ah, the car tore up.

Q. Do you know where it was near?

- A. It was near the store, ah, -
- Q. Did you make it through the stop light there?
- A. Yeah, as a matter of fact we did and I had, and it stopped going up the hill on the other side of the light.
- Q. All right. Then what did you do?
- A. I drifted it back down to where it was setting when y'all found it.
- Q. All right. And what did Mark and Ben do?
- A. Ah, well, we, ah, was trying to take the tags off and get the liquor and the guns out of the car.
- Q. What did, let me back up a second. What were they doing while you were drifting the car back?
- A. Guiding me.
- Q. All right. And you went a long way, if I remember correctly?
- A. Yeah.
- [612] Q. Did you turn -
- A. On oncoming traffic.
- Q. And did you turn it off onto a side lane?
- A. Yeah.
- Q. And that's where it stopped?
- A. Yeah.
- Q. Was it on the right side or the wrong side of the road then?
- A. It was on the wrong side.
- Q. Okay. Then you said you tried to take the tags off?
- A. Yeah.
- Q. Were the tags taken off?
- A. That's what we, we was trying, to get the tags off and I don't remember if they come off or not and we was getting the guns and the liquor out of the car.
- Q. And what were you going to do with them?
- A. Ah, well, we would stash them in the woods or, or to steal us a car and get out of there.
- Q. Okay. And who had the rifle at that point?
- [613] A. I had the rifle.
- Q. Who had the shotgun?
- A. Ah, Mark had the shotgun.
- Q. And who had the pistol?
- A. Ben had the pistol at that time.
- Q. How did Ben end up with the pistol after the car stopped?
- A. He told me and Mark to walk towards some trees in the parking lot of the store and, ah, he would get us a car.
- Q. I show you Exhibit Number Two (2) again, the car. That's where it stopped.
- A. Yeah, well, it stopped up there (pointing) and then we drifted it back over there (pointing).

Q. All right. Now, which way, you said you were walking towards the trees?

A. Yeah. Okay, it would be that way (pointing) there is trees and, that right there is trees (pointing).

Q. All right. Were there cars in the parking lot?

[614] A. Yeah.

Q. And did you see where Ben went?

A. Yeah.

Q. Where did he go?

A. Over to that boy.

Q. Was the boy near a car?

A. Yeah.

Q. And what was he doing?

A. Just looking at his tire.

Q. Was the car running, or do you know?

A. Ah, I think it was running.

Q. Was he looking at a front tire or back tire?

A. Front tire.

Q. Driver's side or passenger's side?

A. Passenger's side.

Q. And Ben went up to him?

A. Yes.

Q. And where were you all then?

A. Walking towards the pine trees.

Q. And did you see what happened then?

[615] A. Yeah, ah, he hollered - come on - and went over that way. He had the gun pointed at him and, ah, me and, I got in the passenger's side of the car and Mark got in the back of the car in the passenger's seat and Ben told the boy to get beside Mark and then Ben got behind the wheel.

Q. All right. Now, when you came up, was the person still standing by their front tire?

A. Ah, no, he was more in front of the car closer to Ben.

Q. And where was Ben at that point?

A. Ah, right at the right, at, right at the driver's front fender.

Q. Did you see if Ben had anything in his hand?

A. Yeah, he had the pistol in his hand.

Q. And what was he doing with the pistol?

A. Ah, just telling the guy to come on and give me your money or something sort of in that, of somewhere in that area.

Q. And did you see anything change hands [616] between the two (2) of them?

A. Yeah, I seen him hand him his wallet.

Q. All right. Did you see any bills or anything?

A. Yeah, it looked like maybe just like one (1) -

MR. TURK: Your Honor, I would object. I believe he's leading the witness through the last couple of questions.

THE COURT: All right, sir. Just rephrase them. You don't have to repeat the ones that have already been answered.

Q. And then the person got in the vehicle?

A. Yes.

Q. What did you and Mark do when the car doors opened?

A. We got in. We got in the car.

Q. Did you look towards the person?

A. No, looked away from him because of the overhead light in the car.

Q. He got in the back seat?

[617] A. Beside Mark.

Q. Ben was driving at that point?

A. Yes, sir.

Q. And where did you go?

A. We started down towards Whitethorne.

Q. Back down Price's Fork from where you had come?

A. Yes.

Q. And where were you going?

A. Ah, just basically just down the road.

Ah, you, we just was going to drop him off in, where ne'd have to walk to get to a phone and we ended up in Whitethorne.

Q. All right. Did the person talk to you all while you went down?

A. Yeah, he, he, ah, told us that, ah, he'd have of, ah, gave us a ride if we had of asked and, ah, and told us if we would go back and get his friend, then, ah, back at the store, then, ah, he would take us wherever we needed to go.

Q. Did you all turn around?

[618] A. No.

Q. Ben was still driving at this point?

A. Yes, at this point.

Q. And you pulled into Whitethorne?

A. Yeah.

Q. And what happened when you got there?

A. We'd told him to close his eyes so we could get out of the car because -

Q. Who is we?

A. Me and Mark. Because he had already seen Ben's face and, ah, we told him to close his eyes.

Q. And did you and Mark then get out?

A. Yeah, when he closed his eyes.

- Q. And who else got out?
- A. Ben got out.
- Q. Now, did anybody have any firearms at that time?
- A. Yeah, the, ah, the pistol was, ah, in, ah, the front of Mark's pants.
- Q. Did Mark have the pistol back then?
- A. Yeah. It went back and forth between [619] hands.
- Q. And Mark was in the back seat with him?
- A. Yes.
- Q. And what did you do with the rifle?
- A. It was still laying in the car.
- Q. What part of the car?
- A. Ah, in the front where I was sitting. In the front passenger's, in the floorboard.
- Q. Do you know where the shot gun was?
- A. Ah, I think it was in the floorboard too, in the back floorboard.
- Q. Now, the shotgun, do you recall how much ammunition you had for that?
- A. A, ah, I believe, I'm pretty sure we only had two (2) shells for that and one (1) of them was shot at the goose.
- Q. Everybody got out at Whitethorne?

- A. Yes, we sure did.
- Q. Was the car still running?
- A. No.
- Q. Were the lights on?
- [620] A. Yeah. The, ah, not the, ah, not the headlights, but the light, marker lights, parking lights.
- Q. So, the headlights were on?
- A. No, the headlights wasn't on. It was the parking lights.
- Q. The little yellow ones?
- A. Yeah.
- Q. The warning lights?
- A. Yeah, on the side.
- Q. And which way had you all come in? If you look over here to this diagram, down to the end is across, the railroad tracks is apparently where you enter, is that correct?
- A. Yeah, it's only one (1) way in there.
- Q. Okay.
- A. And one (1) way out.
- Q. And where did you go after you went in?
- A. Ah, there was a big stack of railroad ties and stuff and that's all I remember.
- Q. If I could just show you Commonwealth's Exhibits Thirty (30), Twenty-nine (29), and I'm sorry, I

[621] can't tell if it's Twenty-eight (28) or Thirty-eight (38), photographs of that area in the daylight. Do you recognize anything in these pictures?

A. Well, I thought it was railroad ties, but, yeah, the house.

Q. Okay. Would you point it out to the jury, the house on Number Thirty (30)?

A. Yeah. (Pointing).

Q. And this big stack -

A. Yes.

Q. Is what you call the railroad ties?

A. Yes, it was dark really.

Q. Now, whereabouts did you have the car?

A. Ah, it would be back this way (pointing) back towards there.

- Q. Okay. If you look in this picture, Number Twenty-nine (29).

MR. SCHWAB: Do you need to see this?

MR. TUCK: I'd like to. The witness is being examined and I have a right to see which, where he's at, and what he's -

[622] THE COURT: You can have a, you can look at it. Go ahead.

A. Okay. It was back this way somewhere (pointing).

Q. All right. The house would be down here or the -

A. Yeah.

Q. Or the train station, whatever?

A. Yeah, it was across there.

Q. And were you all in one side of the car?

A. Yeah.

Q. Which side was that?

A. That, ah, that would be the driver's side. Once we'd all got out.

Q. What happened after you got out?

A. Ah, Mark told him to walk and, ah, (pausing) and Ben told him to take his clothes off.

Q. Did he take his clothes off?

A. Down to his underwear and his socks.

Q. What happened to his clothes?

A. They got threw in a river.

[623] Q. What happened to him there after he took them off, if you know?

A. At the time, I thought it was funny. I guess we all did, and, ah, -

MR. JENKINS: Well, Your Honor, we object to him speculating on what the other people thought it was.

A. Ah, -

THE COURT: Yes, but I mean he can certainly testify to what -

MR. JENKINS: Said it was funny as far as he was concerned.

A. Basically, him agreeing though.

THE COURT: To, he would testify to what he felt.

MR. JENKINS: I was making an objection, son, to the Court.

THE COURT: Go ahead and answer the question that was asked, but just limit your answer to your feeling.

A. Ah, well, all right, I thought it was sort [624] of funny and, ah, because he'd have to walk to a, to find a phone in his underwear and his socks, I mean.

Q. Now, did you have any conversation with him before Mark told him to go on or Ben told him to take his clothes off?

A. I don't recall.

Q. And which way was he walking?

A. Ah, towards, ah, the same way we came in, that way. There's only one (1) way out and one (1) way in.

Q. All right. And how far had he walked after his clothes were taken off?

A. Fifty (50) yards or so, or fifty (50) feet or so, I'm not sure. It wasn't far.

Q. And after he started walking, what did you do?

A. I got in the driver's seat of the, of the car.

Q. And what did Mark do?

A. He got in the passenger's seat.

Q. What did Ben do?

[625] A. Ben got in the back and he told Mark to give him the pistol back and he got out of the car and run up to him (pausing) and he turned him around and shot him.

Q. Did you hear the gun shot?

A. No, I seen flashes.

Q. One (1) or more?

A. More.

Q. And what happened to this person as the flashes went?

A. I saw him throw up his arm (describing).

Q. And then what?

A. (Pausing) Fell on the ground. Just staggered back and fell on the ground.

Q. Did Ben come back to the car?

A. Yeah.

Q. Right away or did he delay?

A. Came back to the car.

Q. And where did he get in?

A. In the, back in the back.

Q. And after he got inside, was anything [p. 626] said?

A. Yeah.

Q. And what was said?

A. Me and Mark was asking him why did he do it back and forth and he said - because I've been in the penitentiary and I ain't going back. He said that boy saw his face.

Q. Did you leave this area right away?

A. Yeah.

Q. Who was driving?

A. I was.

Q. And where did you go?

A. It was some back roads. We winded, well, we went to the river first down in McCoy.

Q. Did Benjamin Lilly say anything else there at the scene other than what you testified to?

A. As we started moving the car a little bit and as the car started moving some he, he asked, he said, - give me a fuckin' beer.

Q. You went on down the road?

A. Yeah.

[p. 627] Q. Did you ever get any beer?

A. Yeah.

Q. And where did you do that?

A. Ah, with the money that, that, that guy had gave Ben. He went into the store. That -

Q. Did you and Mark go in?

A. No.

Q. And what did Ben come out with?

A. He come out with ah, I don't remember if it was a twelve (12) pack or a case and a pack of cigarettes.

Q. What kind of beer, if you remember?

A. Busch Light, or Busch, one of the two.

Q. Who was driving then?

A. I was.

Q. And where did you go from the store with the beer?

A. Down to the river, down to McCoy River.

Q. And what did you do down there?

A. Threw away anything that might have our prints on it.

[p. 628] Q. And what did they include?

A. Some clothes, backpack, the piece of plastic that covers the speedometer. I don't remember all.

Q. Why did you throw away the piece of plastic?

A. Because that I had touched it.

Q. Now, did anybody, was anybody wearing gloves?

A. Yeah, we all three (3) had gloves.

Q. Well, what point did you end up -

A. Opening a beer? My gloves was fat and I couldn't open the beer.

Q. And then how did you end up touching the plastic?

A. I don't remember, but I remember touching it, so I knocked it out and threw it over the hill.

Q. And whose clothes did you throw away?

A. The boy's.

Q. And the backpack with, do you remember anything about that?

[p. 629] A. It, it had some books of his or something and it was heavy.

Q. Where was it in the car?

A. I don't remember if it was in the floorboard or in the trunk. I don't remember.

Q. Okay. Do you remember what color it might have been?

A. No.

Q. Was it light or dark?

A. It was a darker color, I believe.

Q. Let me show you this. Do you recognize this?

A. Yeah.

Q. And what is it, please?

A. That's the boy's backpack.

Q. And you threw that into the river?

A. Yeah.

Q. Were you the only one throwing things in the river?

A. No.

Q. Who else was?

[p. 630] A. It was all three (3) of us.

Q. So, at that point, you had the vehicle, you had the beer. Did you still have all three (3) guns?

A. Yes.

Q. Had you gotten rid of those?

A. No, we still had all three (3) guns.

Q. And who drove away from that place?

A. I did.

Q. And where did you drive to?

A. To the first store that got robbed.

Q. Is that over in Giles County?

A. Yeah.

Q. Okay. Who went, where was everyone else in the car?

A. Mark was still in the passenger's seat and I was driving and Ben was in the back.

Q. Okay. And what happened as you got to the store?

A. Well, at first we passed it and then turned around and went back and, ah, we was arguing on who was going to carry the gun in.

[p. 631] Q. Now, why would you want to carry the gun in?

A. We was going to rob it?

Q. Why were you going to rob it?

A. To get money to get out of town.

Q. Did you have any money with you?

A. No, not that I remember.

Q. Do you know if Mark had any?

A. No, I don't think so.

Q. Did Ben indicate whether he had any other than what he bought the beer with?

A. If it was any change off of it, that would be all he had.

Q. Where did you all park in relation to the store?

A. Right out in front of it.

Q. Had you, while you were talking about getting money to get out of town, did you talk about some place to go?

A. Yeah.

And where were you going?

[p. 632] A. Ah, Ben said he knew some people in West Virginia. That we could hide there for a few days.

Q. So, who all ended up going into the store?

A. All three (3) of us.

Q. Do you remember who went in first?

A. Ah, no.

Q. Who ended up carrying the gun?

A. I did.

Q. And why did you take the gun?

A. I really don't know. I don't know.

Q. Did Ben say anything about taking the gun inside?

A. Yeah, he said he did what he had to do already. Something in that area.

Q. So, you all three (3) went inside?

A. Yes.

Q. What did you do?

A. Ah, took the gun and showed it to them and told them to give up the money.

Q. And when you said them, there was more than two (2) people in the store?

[p. 633] A. Yeah, it was a old man and an old lady.

Q. And who was at the counter?

A. The old man.

Q. And where was the lady?

A. In the back of the store towards the, ah, ah, coolers.

Q. You went to the counter, took out the gun?

A. Yeah.

Q. Which gun was it?

A. It was the pistol.

Q. And what did you do after you took the gun out?

A. I told them to give me the money.

Q. Did you tell them to do anything else? To lay down -

A. To get down on the floor.

Q. Did he do that?

A. Yes.

Q. Who went around to the cash register?

A. Mark.

Q. Did it open?

[p. 634] A. No, the guy had to get back off of the floor and open it.

Q. And the cash register came open?

A. Yeah.

Q. And who took the things out of it?

A. Mark.

Q. You still had the pistol?

A. Yes.

Q. Did you still have it out?

A. Yes.

Q. And did you take anything?

A. Ah, ah, the, ah, the stereo.

Q. Okay. The little radio -

A. Yeah.

Q. Boombox?

A. Yeah.

Q. What else besides what was in the cash register did you all take there?

A. Ah, some more beer and some gloves and stuff. I don't remember exactly what all it was.

Q. Were the gloves on a display?

[p. 635] A. Yeah. Where I was standing, I think I grabbed them too.

Q. Okay. And then where did you go after everybody grabbed what they were grabbing?

A. Ah, back to the car and, ah, Ben was slow coming out. I don't know why, but he was slow coming out.

Q. And you all got back in the car?

A. Yeah.

Q. Where were you?

- A. I was driving again.
- Q. And where was Mark?
- A. Ah, he was in the passenger's seat.
- Q. And where was Ben Lilly?
- A. In the back seat.
- Q. Who had the pistol?
- A. Ah, at that time, it was laying in the seat again.
- Q. Where was the rifle?
- A. Ah, in the back floorboard.
- Q. And the shotgun?
- [p. 636] A. In the back floorboard.
- Q. Where did you drive after you left that little store?
- A. To the second store that got robbed.
- Q. Did you go anywhere else?
- A. Yeah, we counted the money under a trestle, but I don't remember exactly where it was at and it wasn't enough.
- Q. It wasn't enough for what?
- A. To get us out of, out of town to hold us off.
- Q. After you counted it, what did you do with the money?
- A. We each took our share.

- Q. Do you remember about how much that was?
- A. Probably close to, right at a hundred dollars a piece.
- Q. Was there anything other than cash?
- A. Yeah, there was, ah, ah, food stamps and I don't remember if there was any checks or not.
- Q. So, you counted the money and divided it [p. 637] up. What did you do with yours?
- A. I stuck it in my front pocket.
- Q. And where did you go from there?
- A. Ah, to the next store.
- Q. Was that in Pembroke?
- A. Ah, yeah. Ah, Bill Williams' store.
- Q. It's a sort of right there on the main road?
- A. Yeah.
- Q. You pulled in, and where did you park?
- A. Ah, we were, well, out front.
- Q. Okay. And what happened after you got there?
- A. Ah, we all got out and, ah, again we was arguing who was going to do it and, ah, I said, you know, I'll do it, you know, basically, so I grabbed the pistol again and Ben got under the driver's seat and me and Mark went in the store.
- Q. And what happened when you went in the store?

A. Ah, I took the gun out and I told her to give me the money.

[p. 638] Q. And there was a woman working?

A. Yeah.

Q. And did she give you the money?

A. No.

Q. Did she tell you why she wouldn't give you the money?

A. She said they didn't have any.

Q. And who else was in there with you?

A. Mark.

Q. Where did you have the pistol?

A. Out in front.

Q. In your hand?

A. Yeah.

Q. And then what happened?

A. Ah, Bill Williams came into the store and grabbed me.

Q. From behind, the side or the front?

A. From behind, from like my side, he rushed me.

Q. And then what happened?

A. I, I got loose from him and, ah, and, ah, [p. 639] she said, - here take it - and she threw a bag of quarters or some, a whole bunch of change onto the counter and we grabbed it and run out of the store.

Q. Now, these coins, were they in wrappers?

A. Yeah.

Q. Like they come from the bank?

A. Yeah.

Q. After you got loose from Mr. Williams, did you tell him anything?

A. No, not that I recall.

Q. Did you do anything with the pistol at that point?

A. No, not that I recall.

Q. You ran outside and then what?

A. Ah, jumped in the car and, ah, that's when, when it tore up a little ways below the store.

Q. And this is the car you got from the convenience store in Blacksburg?

A. Yes.

Q. Then where did you jump in the car?

A. I jumped in the back that time and Mark [p. 640] was in the passenger and Ben was driving.

Q. All right. And who grabbed the change inside?

A. I don't remember if it was me or Mark.

Q. And you got in the car?

A. Yeah, and, ah, -

Q. Where did you go from there?

A. To where it tore up across the bridge, Pembroke bridge.

Q. Was there anyone behind you?

A. Yeah, Bill Williams. The reason I know it was him because the car was sitting in the parking lot the one, the one that we went and robbed, when we started to rob the store. I recognized it when it got behind us.

Q. And how far did it follow you?

A. It, it got, it was following us across the bridge.

Q. Did you do anything about it following you?

A. Yeah, I took the rifle, I was in the back of the seat and I took the rifle and I pointed it out the [p. 641] window, pointed it up into the air and fired to let him know we had guns and, ah, he backed off.

Q. How much further did you go before the car stopped?

A. Not far.

Q. Now, did you, did the car stop on its own or did it have some kind of problem?

A. It, ah, it, ah, I guess the engine locked up. It just stopped on us.

Q. What did you do with the car?

A. We was getting stuff out of it, ah, and Randy Tilley came around the corner and Mark run over the hill and I run over the hill and I was, and, ah, I thought Ben was behind us, but he wasn't and I fell onto some rocks and Mark kept going and I set up on a rock and I seen them arresting Ben.

Q. Now, you said you were getting things out of the car?

A. Yeah.

Q. What were you getting out the car?

A. The stereo and the beer and stuff.

[p. 642] Q. And what were you doing with them?

A. Or the cigarettes and stuff. Just getting like the evidence out of the car.

Q. And what were you doing with it after you got it out?

A. Just throwing it.

Q. Do you remember any fires?

A. Ah, no, I don't.

Q. And what did you take with you?

A. Ah, I had the rifle and I still had the money in my pocket.

Q. All right. Did you have any coins with you at that time, or do you remember?

A. I don't remember.

Q. How far away had you run before you fell?

A. Not far. Ah, ten (10) yards or so, I guess. Ten (10) or fifteen (15) yards.

Q. Towards the woods?

A. Yeah, towards the woods.

- Q. Were you in the woods?
- A. No, I was in a ditch, a big ditch.
- [p. 643] Q. Could you see where the car was?
- A. Yeah, I could see them walking back and forth past it.
- Q. And you saw Mark, I mean you saw Benjamin?
- A. Yeah, I saw them arresting him.
- Q. Where was he when you first noticed him?
- A. He was standing beside, the, on the passenger's side of the car at that time and he had his hands in the air and they made him drop to his knees.
- Q. How long did you stay there?
- A. Till they got me.
- Q. Do you know how long that was?
- A. Nah, five (5) or ten (10) minutes.
- Q. Could you see all the officers?
- A. Yeah, I watched them walk back and forth past me.
- Q. Were their headlights on?
- A. Yeah, and the blue lights and everything else.
- Q. And how did you end up in custody?
- A. Ah, one of them had heard me.
- [p. 644] Q. Heard you what?

- A. Ah, ah, I was sending a message to my Mom.
- Q. How were you sending a message to your Mom?
- A. I was, just, just told them to tell my Mom I loved her and that was it. I had the gun in my mouth. I was going -
- Q. That was the deer rifle?
- A. Yes.
- Q. Were you still sitting?
- A. Yes.
- Q. And where was the butt of the gun?
- A. It was at my feet.
- A. And the top was in your mouth?
- A. Yes.
- Q. Was the hammer cocked?
- A. Yes.
- Q. You didn't pull the trigger?
- A. No.
- Q. Why did you want to pull the trigger?
- A. (Pausing) From what I seen and, and, and, [p. 645] and for what I did.
- Q. Why didn't you pull the trigger?
- A. Because something deep down was telling me that, ah, that if I, if I had of then they would have just put it on me and all of it on me and, you know, I didn't want my family to hate me, you know.

Q. So, you put the rifle down or threw it down?  
A. Yeah, I threw it behind me.

Q. Now, when you were out there, did you hear, did the police have loud speakers?

A. Yes.

Q. Did you hear them calling out names?

A. Yeah.

Q. Did they call out your name?

A. No.

Q. Did they call out Mark Lilly's name?

A. No.

Q. Do you remember any of the names they called out?

A. Yeah. They called out ah, ah, ah, [646] Michael, ah, Michael Rader and, ah, Chris, ah, Chris, ah, ah, I'm not sure what his last name is. It's Ben and Mark's brother-in-laws. I -

Q. They weren't with you?

A. It's Chris Carter and Michael Rader. No, they wasn't with us.

Q. And after you were taken, into custody, where did they take you?

A. Upstairs.

Q. Did they take you first to the police car there at the scene?

A. Oh, yeah, they took me to the police car.  
Q. All right. And then you went back to their station?  
A. Yeah.  
Q. Who took you back?  
A. Gary Price.  
Q. Did the other cars come back? Did Ben come back with you at that time?

A. No.

Q. Did you see Mark again before you left the [647] scene where the car broke down?

A. No. They, ah, they, ah, brought him in last. They found him walking on the side of the road and I didn't see him until early the next morning.

Q. All right. Did you agree to talk to the police?

A. Yeah.

Q. And you said, is that what you meant by upstairs?

A. Yeah.

Q. And you spoke with Lieutenant Price, is that right?

A. Yes.

Q. And what did he ask you about?

A. He just asked us what happened, asked me what happened and, that night, what was going on.

Q. Did you tell him anything about the names they were calling out?

A. Yeah, they asked me was that who I was with and I told them, no. I told them I was with Mark and Ben Lilly.

[648] Q. All right. Now, did Lieutenant Price, did he ask you about anything other than Giles County?

A. Yeah, he asked where did the car come from.

Q. And what did you tell him?

A. I told him where the car come from. I told him where to find the boy at.

Q. Did he ask you about the boy?

A. He, he was working around to it.

Q. Do you recall drawing a map for one of their police officers?

A. Yeah, I believe it was for Ron Hamlin and Bobby Fleet.

Q. And what was it a map of?

A. To where to find the boy at.

MR. TUCK: Your Honor, I would just note that this wasn't provided in discovery beforehand.

THE COURT: All right, sir. You may have time to review it fully, if you wish.

MR. TUCK: Thank you, Your Honor.

MR. SCHWAB: Your Honor, if the Court [649] may note, that was in our file and has been since the Sheriff's Office first provided us with reports.

Q. Do you recognize that?

A. Yes.

Q. And whose handwriting is that?

A. Ah, I believe, I believe it's mine and, ah, ah, Ron Hamlin's.

Q. Did you draw it yourself?

A. Yeah, I drew it, but I told him, told him what they was and he was labeling them.

Q. The bottom part here (pointing)?

A. That, that was me.

Q. That word is railroad ties?

A. Yeah.

Q. And what's the X for?

A. That's where he was at.

Q. Did you know his name?

A. Yeah, he had, he had said his name. His first name.

Q. And what was that?

A. Alexander.

[650] MR. SCHWAB: Your Honor, we'd move for admission of the diagram that Gary Barker has indicated he wrote part of?

THE COURT: Any objection?

MR. TUCK: No objections, Your Honor, and if Mr. Schwab indicated it was in his file, I'm sure it was.

THE COURT: All right, sir. It's admitted without objection.

CLERK: Commonwealth's Exhibit Number Forty-five (45) is a handdrawn map.

Q. Now, what did you think was going to happen after you told investigator Price about what you'd done in Giles and where the car and, came from and where to find Alexander?

A. I knew I wasn't getting out. I knew that much.

Q. Did you talk to any more officers that night?

A. Ah, yeah, I talked to a lot of officers.

Q. Or did you talk to someone from Blacksburg [651] named Sergeant Goodman?

A. Yeah, Donnie Goodman.

Q. Did you talk to Investigators Hamlin and Fleet?

A. Yes.

Q. Were you up most of the night?

A. Yes.

Q. Between talking to the officers, where did they keep you?

A. In the same place.

Q. Which was?

A. Upstairs.

Q. In one of the rooms?

A. Yeah.

Q. Were you handcuffed or -

A. Yeah.

Q. Do you remember what you were wearing that night, Gary?

A. Ah, a old ragged pair of blue jeans and some Nikes, a T-shirt.

Q. Do you remember what was on the T-shirt?

[652] A. Ah, I believe it was a marijuana leaf.

Q. Did you have any other kind of other coat or something to wear?

A. It was a pullover like sweater sort of.

Q. What color was it?

A. Ah, it's mixed.

Q. Now, the next day I think Investigators -

A. Ron Hamlin and Bobby Fleet came back.

Q. And what did they want that day?

A. Basically to see, to see if, ah, what I said would change, I reckon. I don't remember why they told me they were there.

MR. JENKINS: Your Honor, if he doesn't know why they came back, it's improper for him to speculate on why they came back.

THE COURT: I don't think any harm was done by that question or answer.

MR. JENKINS: Exception to the ruling of the Court, Your Honor.

THE COURT: All right, sir.

Q. Do you remember asking you about any [653] things that may have been in the car?

A. Yeah. They, ah, that's where, that's when I told them where the, where we had threw the clothes and the backpack at and explained where to find them.

Q. Did you ever talk to anyone from Floyd County?

A. Yeah.

Q. Did you tell them what happened over there?

A. Yeah.

Q. Did you get charged in Floyd?

A. Yeah.

Q. And did you get charged in Giles?

A. Yes.

MR. SCHWAB: Your Honor, at this time we'd move for admission of a certified copy of the Plea Agreement of Gary Barker.

MR. TUCK: Your Honor, I would concur with that. We had planned on introducing it as evidence as well.

THE COURT: All right, sir.

[654] MR. SCHWAB: As well as the certified copy of the Order of conviction of this Court.

THE COURT: All right, sir.

MR. SCHWAB: Concerning Mr. Barker's eight (8) charges.

THE COURT: All right, sir. They're accepted without objection.

Q. Gary, you said something about -

THE COURT: Mr. Schwab, just a moment, please, while we -

MR. SCHWAB: Okay. Fine, Your Honor.

THE COURT: Mark the exhibits.

CLERK: Commonwealth Exhibit Number Forty-six (46) is a certified copy of the Plea Agreement. Commonwealth Exhibit Number Forty-seven (47) is a certified copy of the, of the conviction order.

MR. SCHWAB: Thank you.

Q. Gary, you said something about one reason you were going to kill yourself or thinking about it that night because of what you'd seen?

A. Yeah.

[655] Q. And what did you mean by that?

A. Well, I, I seen a guy get shot down for no reason (pausing), none whatsoever.

Q. Had you ever seen anybody shot before?

A. No.

Q. Had you ever talked about shooting somebody?

A. Yeah, I have. I've talked about it, you know. Ah, when push comes to shove though, I mean, I couldn't do it, but I've, me and all my friends have, you know, just drunk and running your mouth, you know.

Q. When you drank, did you like to run your mouth?

A. Yeah.

Q. Did you like to be a tough guy?

A. Somewhat of one, yeah.

Q. And would you often say you could take people out or you wouldn't mind doing stuff?

A. I, I know I've said it probably more than once.

Q. Are you ever going to say it again?

[656] A. No.

Q. Why not?

A. Just sick man.

Q. What's sick?

A. It's, it's, it's nothing like I've ever saw. It's not like, it's not like a deer or anything like that it's (pausing) - I'd like to take a recess, if I can.

MR. SCHWAB: That's all the questions I have for him now, Your Honor, if that would be okay.

THE COURT: All right, sir. Thank you. Ms. Skidmore, if you would take the jury out, please.

#### WITNESSES RETURNED TO COURTROOM

THE COURT: Ladies and Gentlemen, I have been advised your testimony will not be needed this afternoon and I'm going to release you subject to recall and the same admonishments that I've given you earlier are still in effect and that is you're not to discuss your testimony or any element of this case with anyone else or allow them to discuss it with you and you're not to watch any TV or radio accounts or read any newspaper [657] accounts about this until the case is concluded. Does anyone have any questions? All right, thank you Gentlemen, do they need to return at 9:00 or are they subject to call?

MR. TUCK: Your Honor, I believe most of them would be, I see the Commonwealth has two (2) more witnesses. I don't know of any other, so, I'm looking at this group and saying that all of them can start off from the beginning in the morning, first thing, 9 o'clock. I am assuming that the Commonwealth's evidence will be in fairly soon.

THE COURT: All right. Okay. Let's excuse you then until 9:00 a.m. in the morning and if you'll return to the same room that you have been in today. Thanks very much. Mrs. Skidmore, would you show them out?

THE COURT: All right, let's bring the jury in, please.

THE COURT: Mr. Schwab, am I correct that you have completed your direct examination?

MR. SCHWAB: As best I can remember, [658] Your Honor.

THE COURT: All right, sir. Then, Mr. Tuck, let's proceed with cross.

CROSS-EXAMINATION  
BY MR. TUCK:

Q. Mr. Barker, I believe you indicated under direct examination that you had received a plea bargain for fifty-three (53) years. Is that correct?

A. Yes, sir.

Q. All right. Let's talk about that plea bargain for a little bit. Can you tell me if you were to be, what's the maximum penalty for robbery?

A. Ah, I think twenty (20) years. I think, I'm not sure.

Q. Would there be something I could refresh your recollection with? Let me show this to the Commonwealth.

MR. SCHWAB: You should know what the statute is, sir.

A. I, I try not to think about it too much.

Q. I've got the highlighted portion. What [659] does the highlighted portion indicate? Well, read it to yourself, not aloud. Now, does that refresh your recollection as to how much robbery carries?

A. Yeah, somewhat.

Q. All right. How much does it carry?

A. Ah, five (5) to life.

Q. So, we've got (writing on dry erase board). Now, how much, if you recall, does abduction carry?

THE COURT: Excuse me. Mr. Tuck, let's make that accurate then since there is a range.

MR. TUCK: Oh, I'll be more than happy to.

Q. Five (5) to life, is that correct? Is that correct?

A. Yes, sir.

Q. All right. Now, do you recall under the Code Section that you were charged with an abduction, as well as your codefendants, can you tell me how much that carries?

A. Ah, I'm not sure.

[660] MR. TUCK: I've also, I've got the Code Section as well as the class. Mr. Schwab.

MR. SCHWAB: If it's cross-examination, Your Honor, he can just ask him if that's the correct sentence or if he knows.

THE COURT: I'll assume that Mr. Tuck has -

Q. Punishable by a Class Five (5) Felony -

THE COURT: Copied the correct sentence.

Q. Class Five (5) Felony is imprisonment for ten (10) years, is that correct?

A. Yes, sir.

Q. Do you remember under the Code Section which you were charged how much the car jacking would carry?

A. Ah, I'm not sure.

Q. Would that be life as well?

A. Ah, could be.

Q. Can you tell me, now, let's see, I believe, we've got abduction, car jacking and how much [661] were you facing for the murder charge?

A. Ah, -

Q. A principal in the second degree?

A. Life.

Q. Now, were there four (4) other charges? The use of a firearm in the commission of a felony?

A. Yes.

Q. They carry a mandatory sentence, isn't that correct?

A. Ah, I believe it's three (3) years.

Q. Three (3) years. So, three (3) times four (4), that would be twelve (12)?

A. Yes, sir.

Q. All right. Now, that's just the Montgomery County charges, isn't that correct?

A. Yes, sir.

Q. Now, did your plea bargain just include the Montgomery County charges or did it include the Giles County charges?

A. Ah, it included Giles County.

Q. So, on those Giles County charges there is [662] two (2) more robberies, right?

A. Yes, sir.

MR. SCHWAB: Your Honor, Mr. Tuck knows as well that the Plea Agreement in this county speaks for itself. As far as any agreements in any other county, if the record may show that this Commonwealth Attorney's Office did not make any agreement concerning any other jurisdictions, and, to my knowledge, he hasn't come to trial in those other jurisdictions.

THE COURT: All right, sir. Does the Plea Agreement refer to out of Montgomery County case?

MR. TUCK: It does not refer to any out of Montgomery case -

THE COURT: All right, sir. Then I'll sustain the objection.

MR. TUCK: Your Honor, may I ask you a simple question? I believe that Mr. Spangler was here in the Courtroom when this Plea Agreement was arranged. I believe he was contacted by telephone to see if he would run his fifty-three (53) years concurrent and that was the agreement. Now, it may not be in the Plea [663] Agreement, but I believe it goes to the credibility of this witness and I believe it's essential that we bring out the fact that he was facing charges in other counties and that is to run concurrent.

THE COURT: Well, you can bring out that he's facing charges in other counties, that's proper, but if, where you're referring to is not a part of the Montgomery County Plea Agreement, you may not go into that, but

you may ask him if he were facing any other charges that were not encompassed by this agreement.

MR. TUCK: Your Honor, I take exception to your ruling -

THE COURT: All right, sir.

MR. TUCK: And I would, please note my objection based on the Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

THE COURT: They're noted.

MR. SCHWAB: Your Honor, could you also -

MR. TUCK: Your Honor, I believe I [664] should strike the last.

MR. SCHWAB: Instruct defense counsel again to add the minimum sentences?

THE COURT: Yeah, -

MR. TUCK: I asked him the question of maximums. I didn't ask him the question of minimums. Back to the first question -

THE COURT: All right. But I think it's only fair if you're using this as an exhibit for the jury. I think it's only fair that you give the range of sentences.

MR. TUCK: I believe the, the principal in the second degree is twenty-five (25) years. I may not be certain. If Mr. Schwab would like to correct that I would be more than happy.

MR. SCHWAB: It's one (1) to ten (10) on the other.

MR. TUCK: I believe this would be a, that would be a -

MR. SCHWAB: Twelve (12), that's correct.

[665] MR. TURK: [sic] And, Your Honor, I am just going to simply scratch through the bottom line.

THE COURT: All right.

Q. Now, you indicated, I'll, how many felonies have you been convicted of?

A. Ah, I don't believe I have.

Q. You don't believe you have?

A. No, I don't -

Q. You remember entering pleas of guilty eight (8) times in Montgomery County?

A. Yeah, on my Plea Agreement, yeah.

Q. So, that was eight (8) felony convictions.

A. Okay, then that's eight (8) then.

Q. Do you, are you only convicted of eight (8) felonies or is there some more felonies out there?

A. Ah, ah, in Floyd County.

Q. Two (2) more felonies?

A. Yes, sir.

Q. Have you ever been convicted of any crimes involving moral turpitude? Those are lying, cheating or stealing?

[666] A. Ah, yes, sir.

Q. And how many?

A. I'm not sure.

Q. Would, I believe the Commonwealth yesterday indicated that they would provide certified copies. I have one and there is one that is maybe in some question. Would this -

THE COURT: Let Mr. Barker review those to refresh his memory.

A. Ah, this hasn't went to Court yet.

Q. Hasn't went to Court yet. You didn't go to Court on 4-25-95? This is a certified copy from the General District Court. You didn't go to Court on 4-25-95 or you just, you just can't remember?

A. I don't remember. I don't believe I did.

Q. Didn't remember -

A. I remember those charges, but I -

Q. Present. Pled not guilty. Found guilty as charged. April 25th, Judge Mullins was on the bench. Don't remember that?

A. Huh-uh.

[667] Q. okay.

A. Ah, as a matter of fact, I just got a continuance on a, on a some charges that Joey Showalter was representing me on and them, those are the ones. As far as I know, you, you got some wrong paper work.

MR. TURK: Your Honor, I would, I believe it's the same paper work that the Commonwealth Attorney had. I'd ask this to be Defendant's Exhibit Number One (1) and let the certified copy speak for themselves.

THE COURT: All right, sir. Any objection?

MR. SCHWAB: No, Your Honor.

CLERK: Defendant's Exhibit Number One (1), certified copies of arrest records.

MR. SCHWAB: Your Honor, getting back to the question, first degree murder would be twenty (20) to life.

MR. TUCK: Your Honor, I'll be more than happy to correct that.

MR. SCHWAB: Car jacking is fifteen (15) [668] to life.

MR. TUCK: I believe that was car jacking.

MR. SCHWAB: All right.

Q. Now, let's go back now. You've got the charges over in Floyd. Those are felonies, correct?

A. Yes, sir.

Q. They also involve crimes involving moral turpitude. Was one (1) of those charges lying, cheating or stealing?

A. Stealing, yes, sir.

Q. So, that's a third (3rd), is that correct?

A. Yes, I guess.

Q. Now, you were just there today, is that correct?

A. Yes, sir.

Q. And you didn't remember those felony convictions that you were just over there today?

A. It was two (2), I don't, it was two (2), I mean.

Q. And what were the two (2) charges? We [669] know one (1) is grand larceny. What was the other?

A. Breaking and entering.

Q. Now, I'm going to ask you to take a minute and ask you, see, reflect back, is there is any other charges, convictions of lying cheating or stealing that you have been convicted of? Take a, take a minute to reflect.

A. Ah, no, other than what we just went over.

Q. But you're still denying that you were convicted of that one up there?

A. I do not remember it.

Q. Now, I believe you said, indicated that you had given, let me take a step back. I guess this is probably pretty important to you, this, this trial from the indication you didn't want your family to, you didn't want to take the blame for it because it would upset your family, is that correct?

A. Ah, I didn't want to take the blame for it because I didn't do it.

Q. Okay. And, so, it would upset your family?

[670] A. Yeah, I'm sure it would have.

Q. So, this trial was pretty important to you?

A. Actually, I'd rather be doing other things than be setting here.

Q. Did you watch television accounts last night about this?

A. Ah, no, I sure didn't.

Q. Did you read any newspapers about these events?

A. Ah, yeah, I caught this morning.

MR. TUCK: Your Honor, at this time I like to motion, to make a motion outside the presence of the jury.

THE COURT: All right. Mrs. Skidmore, if you'd take the jury out, please.

MR. TURK: Your Honor, I believe there was a motion to sequester all witnesses. They were not to read newspaper accounts and that I will be the first one to admit Mr. Barker was not in the Courtroom. However, he has violated that motion, we would ask the [671] Court to strike his testimony and strike him as a witness. He has violated the Court's orders.

THE COURT: All right. Well, he hasn't really violated the Court's order because he hasn't been over here to be admonished. Any response?

MR. SCHWAB: Your Honor, the Code Section provides that the Court can exclude witnesses and there is some language in some cases that they can be separated from each other so as not to learn or hear what the

testimony in Court is. That's clear as the purpose of the ruling. So, one (1), Mr. Barker was never brought before the Court. He was not sworn in until today. Two (2), there is no indication because of what he read in the paper could affect his testimony whatsoever and they haven't shown that. What they're trying to do is a cheap trick to get this thing dismissed and that's exact what it is because they asked the question. He, they know Mr. Barker wasn't here, they knew Mr. Barker wasn't here. There was nothing in that newspaper today to indicate to him anything he could testify about and I see absolutely no reason. He was excluded from the Courtroom. He was [672] separated from the other witnesses and he can be questioned, if they would like, about what he learned from the paper today, but he does not have to have his testimony stricken for that reason.

THE COURT: Mr. Barker, you read today's newspaper?

MR. BARKER: Yes, sir.

THE COURT: Which one?

MR. BARKER: THE ROANOKE TIMES.

THE COURT: All right. Mr. Weaver, I believe there's a copy of that paper in the office, in Mrs. Cole's office. Would you bring that to me, please.

MR. TUCK: Your Honor, while I believe someone is going to get the newspaper, Mr. Jenkins has indicated to me that we both by saying it's a cheap trick -

MR. JENKINS: Your Honor, we object to that. That, there's no call for that.

THE COURT: Well, it was not said before the jury, so -

MR. JENKINS: Said before anybody, Your [673] Honor, I object to that.

THE COURT: Well, -

MR. JENKINS: We're doing the best we can -

THE COURT: Well, I'm beginning to object to both attorneys in their approach to asking questions and responding to questions and I'm not going to have any more of it and this was not done in the presence of the jury, so it has no bearing on your conduct has, or no one's conduct has any bearing on what the jury has witnessed.

THE COURT: (Reading THE ROANOKE TIMES article).

THE COURT: Mr. Barker, has anything that you read in this morning's edition of THE ROANOKE TIMES influenced in any way your testimony before this Court?

MR. BARKER: Ah, no, sir.

THE COURT: All right, sir. I'm going to overrule your motion. I am going to permit you to, if you wish, to attach a copy of the news article with your [674] exceptions, but there is no reason to believe that he has been influenced in any way by what he read.

MR. TUCK: Your Honor, perhaps we could mark that Defendant's Exhibit Number Two (2) and allow that to go on as, as that.

THE COURT: All right, sir. You'll have to produce your own copy, Mr. Tuck.

MR. TUCK: Your Honor, I believe Ms. Garcia is in the Courtroom and I am sure THE ROANOKE TIMES will provide us a copy. Your Honor, I believe, after speaking with counsel, -

THE COURT: Excuse me a minute.

COURT REPORTER: Is it an exhibit?

THE COURT: No, no, I said -

MR. TUCK: No, it's -

THE COURT: I said you may, you may attach it to your objection, I mean to the motion as an attachment to that motion.

MR. TUCK: Oh, as an attachment. That would be fine, Your Honor.

MR. TUCK: Your Honor, also, I have [675] spoken with counsel and we would move for a mistrial at this point in time because we believe that Mr. Barker has read and violated the sequestration order and I understand the Court's prior ruling and I understand what the Court may rule, but if you would simply note our objections.

THE COURT: All right, sir. And I am going to deny the Motion for a mistrial. Number one (1), Mr. Barker has not been before the Court to receive any admonishments, and Number Two (2), after having questioned him in so far as the article in today's paper is concerned, he has stated, under oath, that it in no way would influence his testimony at all and the Court in having read the article does not feel that there is anything in the article that could influence his testimony today.

MR. TUCK: Your Honor, obviously, we disagree with the Court, so we respectfully take note of our objections and based on the Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

THE COURT: I understand and they're noted.

[676] MR. TUCK: Thank you, Your Honor. Your Honor, I believe we're about ready for the jury again.

THE COURT: All right, sir. Everyone through with their motions? All right, Mrs. Skidmore.

THE COURT: All right, Mr. Tuck, go ahead and continue.

MR. TUCK: Thank you, Your Honor.

Q. I believe you indicated to the Commonwealth that you had been interviewed approximately four (4) times by the police, is that correct?

A. Ah, yes, sir.

Q. Two (2) with Hamlin, one (1) with Goodman and one (1) with Lieutenant Price, I believe, from over in the Giles County Sheriff's Department?

A. Ah, and one (1) from Floyd.

Q. And one (1) from Floyd. So, there were actually five (5)?

A. Yes, sir.

Q. Now, in any of those, did you indicate that you went to Radford that evening, the night before, [677] December the 4th?

A. I don't recall.

Q. You don't recall. Would looking at them refresh your recollection?

A. Ah, yes.

Q. Okay. I'll be happy to.

Q. This is, just for the record's sake, Lieutenant, Detective Sergeant Goodman, I was getting ready to give him a raise. I believe I'm, we're at Page 3, 2 and 3.

THE COURT: Gentlemen, let me address you while Mr. Barker is refreshing his memory, the Court's objective is to adjourn Court today for 5:30 and anticipating you will not complete your cross, I'm going to leave it up to you, Mr. Tuck, to tell me when it would be a convenient time in the break, in the chain of your cross-examination to adjourn.

MR. TUCK: Your Honor, if I might have a word with co-counsel.

THE COURT: All right.

MR. JENKINS: Whatever you, go ahead, [678] whatever you want to do.

MR. TUCK: Your Honor, I, I would just simply continue on and when we get to 5:30 I'll -

THE COURT: All right, sir, but you know I think it's important that you consider where we break and if there's, if you're at 5:20 and there is a logical stopping point, then we'll do that. In other words, our goal is 5:30 and I'll leave it up to you to advise me of a convenient stopping point.

Q. In reviewing Detective Goodman's statement, did you indicate that you went to Radford?

A. Ah, no, sir, I didn't.

Q. Would you like to review the others to see if you in fact told them?

A. Ah, no, I believe that's all right.

Q. So, you didn't tell them that you went to Radford, is that correct?

A. That's correct.

Q. Now, when you were over at Warren Nolen's home, over in Radford, because you testified you were over there?

[679] A. Yes, sir.

Q. You didn't tell the police that?

A. Well, ah, I guess, ah, he just got out of the penitentiary and you don't just drag people into stuff that really had nothing to do with it.

Q. Okay.

A. Unless it's absolute -

Q. All right. So, you were holding back to the police? You didn't want to tell them everything?

A. Ah, as far as that went, yeah, we stopped by there. He knew nothing about where the gun was stole or anything like that.

Q. You didn't tell them that -

A. I felt it wasn't no reason to put a man in some position that he didn't want to be in.

Q. Well, did you tell him that you committed the robberies over in Floyd County?

A. Ah, I don't recollect that we told him anything.

Q. All right. Did Ben ever possess any of the weapons, firearms, while he was over there?

[680] A. Yes, sir.

Q. He did, and you're certain of that?

A. Positive.

Q. Did you in fact tell Warren Nolen and Patricia Quesenberry that if someone was riding behind you trying to pull you over that you would take a shot at them?

A. Ah, I do not recall that.

Q. So, you're saying you didn't say that?

A. Yes, sir.

THE COURT: I think he said he didn't recall that.

MR. TUCK: And I believe that I, and I asked, are you saying you didn't say that and he responded, yes, sir, I believe.

THE COURT: Let's make sure he understands the questions because they are contradictory answers.

A. Ah, I'm pretty sure I didn't say that.

Q. Pretty sure you didn't say that. All right. Now, I believe, then you went over to Blacksburg, [681] is that correct?

A. Yes, sir.

Q. All right. And you were, you and Mark Lilly were renting a room from A. J. Falls, is that correct?

A. Yes.

Q. Ben wasn't renting a room. He lived over with his Mom over in Riner, is that right?

A. Yes, sir.

Q. Now, I believe you indicated that you started getting drunk with A. J. Falls, is that correct?

A. Ah, we was getting drunk before we got there, but, yeah.

Q. And you continued to get drunk with A. J., is that correct?

A. Yes, sir.

Q. And I believe you indicated that there are times when you start getting drunk you get a little mouthy, is that correct?

A. Ah, yes, sir.

Q. Talk about doing things?

[682] A. Yes, sir.

Q. At that point in time, did you point the gun at A. J. Falls?

- A. No, sir.
- Q. You didn't threaten him that evening?
- A. No, sir.
- Q. Now, did Ben have any of the weapons when he was at A. J.'s house?
- A. Yes, sir.
- Q. He did, and you're certain of that?
- A. Yes, sir.
- Q. Okay. Now, I believe you also indicated that you went down to some trailer parks after you shot the goose, in that correct?
- A. Yes, sir.
- Q. And then you stopped at a trailer park across from the rock quarry, I believe that's on Jennelle Road, is that correct?
- A. Ah, I'm not sure which road it is, but it's -
- Q. Across from the rock quarry?
- [683] A. Yeah.
- Q. And that's in Montgomery County?
- A. Ah, yes, sir.
- Q. Is it near the road on Holiday Ford?
- A. Yes, sir.
- Q. Okay. So, if that was Jennelle Road, then that was the road that you were on?

- A. Yes, sir.
- Q. Okay. Now, did at some point in time during that evening, when you got to that trailer park, did Mark threaten anybody with that firearm, pull it out and pull the hammer back?
- A. No, sir.
- Q. All right. And you're certain of that?
- A. Yes, sir.
- Q. Now, did you indicate to A. J. that the property was stolen that was in his home?
- A. Yes, A. J. knowed it.
- Q. All right. Did you tell him where you had gotten it from?
- A. No, sir.
- [684] Q. Now, I believe you've indicated that you were wearing a pullover sweater and a marijuana T-shirt, is that correct?
- A. Ah, yes, sir.
- Q. And these are the, is this the pullover sweater? Let the record indicate that I pulled this out of Bag Seven (7).
- A. Yes, sir, that's mine.
- Q. That's it. And this was your T-shirt that you were wearing? I believe it's got -
- A. Yes, sir.

Q. American Center on the back? And that was the shirts and that was the clothing that you were wearing on December the 5th, is that correct?

A. Yes, sir.

Q. Okay. Now, did you ever go, I, I don't recall you mentioning the prosecutor, and perhaps I'm wrong, do you recall mentioning or meeting Joyce Lang or Michael Lang that day?

A. No, not that day.

Q. You did not see them the day, December the [685] 5th?

A. No, sir.

Q. You were not driving Ben's car without Ben being present?

A. No, sir.

Q. You did not tell them, obviously, since you didn't see them that day that you would kill your own best friend and never regret it?

A. No, sir.

Q. Now, let's go to about 6 o'clock. You've indicated that you were out at Cowboys, is that correct?

A. Some, well, I don't remember the exact time, but we at Cowboys, yes.

Q. Was it getting dark?

A. Yes, it was getting dark, yes.

Q. And I believe you indicated that Mark Lilly got out in the car with somebody?

A. Ah, me and Ben got out of the car and, ah, a guy got in the car with Mark.

Q. A guy got in the car with Mark?

A. Yes.

[686] Q. Was his name Ron Lucas?

A. I have no idea.

Q. Don't know what his name was?

A. No, I don't even remember what he looks like.

Q. And you came out there later and pulled out a gun, is that correct?

A. Ah, no, that's not correct. Ah, -

Q. But you did pull out the rifle?

A. Yes, but I didn't come, I, I, I had stated that, ah, that, ah, when we got out of the car and the guy got in the car with Mark, I was showing the rifle to somebody, yes.

Q. Well, Ben didn't come around and tell you to put those damn guns away and take the rifle away and put it in the trunk?

A. Definitely not.

Q. Definitely not. Now, the prosecutor asked you, did Bill Williams, did you say anything to Bill Williams, did you do anything with the gun? This is over at the store over in Pembroke, the second robbery, and I [687] believe you indicated that you didn't, is that correct?

A. Yes, Sir.

Q. You didn't tell him that you would blow his head off, did you?

A. No, sir.

Q. Didn't point the gun at his forehead, did you?

A. No, sir. I was waiving it around, but I wasn't -

Q. You never pointed it at him or never told him you would blow his head off?

A. No, sir.

Now, did you ever state to, do you know who Bo Hutchinson is? Clarence Hutchinson?

A. Ah, yeah, I was in jail with Bo a while back, a good while back.

About a year ago?

A. Ah, way over a year, yeah.

Q. Okay. Did you tell him that you would be coming back to prison for murder?

A. No, I sure didn't.

[688] Q. Do you know Bo Hutchinson? How long have you known him?

A. Ah, well, from the time I was in jail, a couple months, I guess.

Q. A couple months. He was your cell mate?

A. Ah, no, he wasn't my cell mate. He was in our cell block.

Q. Now, I'm going to draw your attention to a statement to Gary Price, you've made to Gary Price. And I believe that was the first interview that you gave.

A. Ah, yeah, I believe he was the first one.

Q. Well, first, let's look at Goodman's statement. I believe you indicated and you testified under oath that you and Mark were, and I want to make sure I characterize this properly, you, well, tell us what was going on when the car breaks down, where are you at, where is Ben Lilly at and where is Mark Lilly at?

A. Ah, they are, ah, I'm in the car and, ah, I, I remember, I remember one of them guiding me back. Ah, I'm not sure if it was both, but I, I, though I was the only one in the car. Both of them was guiding me [689] back.

Q. Both of you were guiding him back?

A. Yeah, I'm pretty sure.

Q. Ben wasn't way down the road or anything like that?

A. No.

Q. Do you recall your statement made to Gary Price? I am going to direct the Commonwealth's attention to Page 18.

MR. SCHWAB: Thank you very much.

Did you indicate, now, I'm, ah, Page 18, I believe, let's, Gary Price says, okay, okay, go ahead. I'm going to ask you to read this to see if it refreshes your recollection.

A. Start right here?

Q. Yeah. Read that and see if that refreshes your recollection as to what you told him?

A. And Mark, me and Mark was -

Q. Now, don't read it aloud. Read it out to yourself.

MR. SCHWAB: Your Honor, defense [690] attorney has already read part of it out loud.

MR. TUCK: I was doing that for instructions -

THE COURT: I'm going let him read it to himself and then ask whatever questions you want.

MR. TUCK: Your Honor, I was simply doing that so the Commonwealth would know where we were at.

Q. Now, did you tell Gary Price that Ben Lilly was still way down the road? Went walking down the road?

A. Ah, that's what it says in there, yeah.

Q. Now, whose decision was it to ditch the guns? Was it yours, or Mark's or Ben's?

A. It was all of our decisions.

Q. All of your decisions?

A. Yeah, we knew we couldn't walk down the road with guns and liquor.

Q. Knew you couldn't walk down the road with guns and liquor.

I draw your attention to, [691] paragraphs. I'm going to ask, see if this refreshes your recollection.

MR. SCHWAB: Your Honor, at this time it appears they're trying to use prior inconsistent statements and if that's the case, then I would like it done the proper way and not as refreshed recollections so those items can come into evidence.

THE COURT: All right. If that's what your intention is, I would sustain that.

MR. TUCK: Your Honor, I'm asking if he recalls making these statements?

A. Ah, yeah, and I was asked about these and I answered the same way it was.

Q. Okay. Now, one of the things that you also said that you said you thought that it was funny that Alexander Defilippis was stripped down to his underwear and socks and was standing out, is that correct?

A. At the time, it was.

Q. Alexander Defilippis had been abducted, his car had been taken, his wallet had been taken, his [692] watch had been taken and his clothes had been taken and that was funny?

A. Ah, I guess drugs make you do some funny things.

Q. So, you were doing drugs that night?

A. Ah, as I stated before, yes.

Q. What kind of drugs?

A. We was smoking some pot.

Q. Now, who is we?

A. Me and Mark.

Q. Is Ben smoking any marijuana?

A. Ah, no, he was just drinking.

Q. All right. Does Ben smoke marijuana?

A. Ah, he hadn't with me.

Q. Okay. So, you've never seen him?

A. No, I haven't.

Q. So, when you were going around to try to sell all these guns to buy weed, I believe you called it, that was for your consumption and Mark's consumption, is that correct?

A. Yes, we had enough alcohol to keep him [693] going.

Q. So, he was drinking the alcohol and y'all were doing the weed, is that right?

A. We was drinking alcohol too, but we had plenty of it.

Q. Now, I believe that you've indicated in prior statements that you were, let's go back to that scene. You leave the scene, you stop some place to buy some beer?

A. Yes.

Q. Where's that at?

A. Ah, I believe the name of the store is Dina's. I'm not positive, but I believe it is.

Q. And Ben Lilly went in, is that right?

A. Yes.

Q. Did he take a gun in with him?

A. No, he didn't.

Q. And he came out with some beer, is that right?

A. Came out with some cigarettes and some beer, yeah, that's right.

[694] Q. Did not rob the store, is that correct?

A. No, he didn't rob that store.

Q. Before we leave that scene, let's talk about something else. You indicated that you covered your face or, or told Alexander Defilippis at the crime scene to close his eyes because you didn't want the dome light to see him, is that correct? The dome lights, so he couldn't see -

A. Yeah. Yeah.

Q. Your faces? That was a concern of yours?

A. Yes, at the time, the only person he saw was, ah, Ben.

Q. And was it also a concern over yours over in Eggleston?

in the first robbery? Did you tell Howard Barnett, don't look at my face?

A. Ah, no, I didn't.

Q. You didn't tell him that?

A. Not that I recall of.

Q. Now, this is a picture of the Heathwood Express and this is where the car is. I am showing him Exhibit, I

believe it's Number Two (2). Is that where [695] the car ended up?

A. Yes.

Q. Is this a light, street light?

A. Yes.

Q. Is this a street light?

A. Ah, it appears to be.

Q. These are all lit up?

A. Yes.

Q. Alexander Defilippis saw your face when you were at the store, didn't he?

A. Ah, no, he didn't.

Q. He didn't see your face?

A. No, he didn't.

Q. He was standing outside the car, is that correct?

A. Yes.

Q. And you and Mark Lilly walked up towards the car, isn't that correct?

A. And got in the car, yeah.

Q. And -

A. We ran up to the car and got in the car.

[696] Q. And it's lit, isn't it?

A. Yes.

Q. And he saw your face, didn't he?

A. I don't believe he did.

Q. You don't believe he did?

A. No, I don't.

Q. Are you certain?

A. Well, I, nobody can be certain of what he seen or what he didn't see.

Q. Were you certain that night? Was it a big concern of yours? Were you certain that night?

A. Ah, yeah, I was pretty certain he hadn't see my face, yes, sir. At the time, I was I still don't think he did.

Q. Did you indicate to any of the other when you give, gave any of the other interviews, did you indicate that you looked away when Alexander Defilippis got into that car?

A. Ah, yeah, me and Mark ran up and got in the car and we made sure he didn't see our face.

Q. In any of the statements that you made, [697] did you indicate to Alexander Defilippis or that you had had him cover his face when he got into the car at the Heathwood Express?

A. Ah, ah, I'm not for sure, I should have. I probably did.

Q. You should have?

A. I mean, you know.

Q. You should have. Now, you stated that all three (3) of you had gloves, is that correct?

A. Yes, sir.

Q. So, Ben should have had his gloves with him with [sic] the police found him, is that correct?

A. Ah, he should have, yes.

Q. And you had your gloves?

A. Yes.

Q. Mark Lilly had his?

A. I don't know. I wasn't with Mark when he got -

Q. All right. But you had yours and you're certain that Ben had his?

A. I had, I had mine. I didn't say I was [698] certain Ben had his, did I?

Q. No.

A. I said he should have.

Q. He should have?

A. Yes.

Q. Okay.

A. Just, you know, slow down when you talk to me and ask me questions and I'll answer them for you.

Q. I'll be more than happy to slow down. Now, we're going back down to McCoy to that grocery store. Ben's in the grocery store, you're horrified by what, why you, according to your testimony of what you had just saw him do, why don't you leave him?

A. Ah, well, ah, basically, when something like that happens and you seen it no matter what anybody says,

you're an accessory and I wasn't ready to go to jail at that time.

Q. Not ready to go to jail. You'd leave him behind. You'd go to the police -

A. Ah, -

Q. And you'd tell them what you saw him do.

[699] A. It don't work that way. Ah, I haven't heard any cases of it working that way. Ah, I didn't pull the trigger, but I was there. Ah, they didn't tell me if I had, if I had of turned him at the time, I'd been free. I'd still been an accessory from the way I see the laws.

Q. So, the way you see the laws, you figured you're not going to leave Ben behind?

A. Well, it's, it's, it's really no use at the time. Ah, we're all in it more than we could handle.

Q. You didn't indicate to any of the police officers that you were afraid of Ben?

A. Ah, I couldn't believe he did that, but, no, I wasn't really, I can honestly say I wasn't afraid of him.

Q. Weren't afraid of him. And you're certain of that?

Now, let's talk about that Eggleston store. I believe you, you indicated that, did you point the gun at Howard Barnett or did you come in like this and, and say give me all your money? Were you calm, were you yelling, were [700] you shaking, excited?

A. That's the first store, isn't it?

Q. The first store, Eggleston.

A. Yeah, ah, well, I was yelling. Ah, I was excited. It was -

Q. Were you pointing the gun at him?

A. I, I do not remember. Ah, I may have.

Q. You may have. You don't remember pointing the gun at him?

A. No, no, not directly at him, no. I remember -

Q. Do you remember -

A. Holding it out. I knew they seen me.

Q. You knew they seen you. You were holding it out because you were robbing the store?

A. Yeah. Well, I, I had him lay on the -

Q. You had him, had him lay on the floor?

A. I had him lay on the floor and, ah, ah, you know, I couldn't see him no more and he couldn't see me either, so, you know, -

Q. But you, you didn't tell him not to look [701] at his face?

A. No, well, he couldn't see me anyway. He was on the floor and there was a counter in between us. Ah, -

Q. Okay. Now, you indicated, I believe, that Mark Lilly came up and cleaned out the cash register, is that right?

A. Yes, sir.

Q. What was Ben Lilly doing?

A. He was back there where the lady was at -

Q. Uh-huh.

A. By the coolers and he was getting beer and, ah, ah, basically I wasn't paying much attention to what he was doing. Ah, he was back there getting beer though.

Q. Did he throw a knife at you?

A. No, he didn't throw a knife at me. Ah, -

Q. Are you certain of that?

A. No, he didn't throw one at me.

Q. All right. Now, you get into the car. Now, your, you're heading over towards Pembroke, is [702] that right?

A. Ah, yeah.

Q. Bill Williams' store? You knew Bill Williams. You know Bill Williams?

A. Ah, I didn't at the time. I do now.

Q. Okay. So, you were going over to Bill Williams' store and Ben Lilly doesn't go in again. Now, let's go back to make sure I, I understand your correctly. You had the murder weapon in your hand at the Eggleston Store, is that right?

A. Yes, sir.

Q. And then you go over to Pembroke and Ben doesn't go in the store at all, does he?

A. Not in the, not the one in Pembroke. No, he didn't.

Q. And you go in and you don't tell Bill Williams that you're going to blow his head off? You don't mention that? You never say that?

A. No, I know I didn't say that.

Q. Okay.

A. I mean there's a few things, you know, [703] that might be a little cloudy, but I know I didn't. I never threatened nobody's life.

Q. I never threatened anybody's life. And you remember Mona Hylton is the clerk?

A. Yeah.

Q. You told her to give you the money?

A. Yes.

Q. And you ran out and got in the car?

A. Ah, no, Bill come up and grabbed me and, ah, and, ah, I got away from him somehow and then I went to the car, ran to the car.

Q. So, there was a struggle? That was a struggle.

A. Some little one, yeah.

Q. And after the struggle, you weren't upset, you weren't angry?

A. Ah, no, it, actually it scared me more than anything I, because I didn't even see him come in.

Q. Okay. And so you, you, then after that you run out and get into the car, right?

A. Yes.

[704] Q. And you're heading down the road and Bill Williams is following you?

A. Yes, sir.

Q. How close was he?

A. Ah, probably two (2) car lengths.

Q. All right. Two (2) car lengths away?

A. Yes.

Q. And you're proceeding down in, what, what are you armed with at that point in time?

A. Ah, -

Q. You had the gun. How did, where's, where's the gun go from there?

A. The gun it was, oh, back into the front seat.

Q. Who's got it?

A. It's just laying in the front seat.

Q. So, you tossed it forward, you're in the back seat?

A. Yeah.

Q. You just threw it up front?

A. Yeah, and, ah, ah, I carried the rifle out [705] of the floorboard, the .35 caliber and I pointed it out the window, up into the air, and I shot.

Q. Didn't, didn't shoot at them while you were going at a high rate of speed?

A. Nah, it, it's, it, like I said, he was two (2) car lengths behind. if I had of pointed it he, he'd knowed it, I mean, you know.

Q. He'd knowed it if he pointed it?

A. Yeah, -

Q. He knew, he would have known if you'd shot it up in the air, is that right?

A. Yeah, that's right. He, you know, that's what made him stop, slow down, you know.

Q. Made him, well, that's what, okay. Then you, you come to a complete stop? Eventually the car breaks down, as you said?

A. Yeah, it stops.

Q. And you come to a stop And are you eating anything at that point in time? Or you drinking anything or what are you trying to do?

A. Ah, trying to drink a beer and get stuff [706] out of the car and just grabbing stuff and throwing it over the hill, things, you know, -

Q. All right.

A. Scattering everything.

Q. All right. Now, Officer Tilley's lights that, I believe, that you indicated you knew which officer it was. He, he, his -

A. No, I, I didn't know it was Tilley, -

Q. Didn't know at the time, but now you do?

A. Yeah, now I do, so -

Q. You've reviewed his statements?

A. Yeah. Now, I know it was Tilley, but I didn't at the time.

Q. All right. And you run, is that right?

A. Yeah, me and Mark both ran and, ah, and, ah, I actually thought Ben was behind us, but he wasn't. They, ah, Tilley had done got up on him, you know.

Q. Ben didn't run, did he?

A. Ah, he tried to, but I, I mean, you know, I'm sure he was scuffling - and -

Q. Was he the first one out of the car?

[707] A. He got out of the car and he come around to the passenger's side and was helping us get stuff out.

Q. He didn't come out of the passenger's side seat?

A. No, he didn't. He was helping get stuff out of the car, but, no, he was in the driver's seat.

Q. He was driving?

A. He was the last one to drive the car.

Q. Okay. But he, he didn't run away?

A. Ah, -

Q. You and Mark ran away?

A. Yeah.

Q. Now, I believe you indicated that you fell down on your knees, skinned them up?

A. I fell down. I don't, I don't recall saying I skinned my knees up, but I fell down.

Q. You fell down. And you went over and you, you were running, is that right?

A. Yeah.

Q. Then you went down and you sat on a rock -

A. Yeah.

[708] Q. With the gun in, in your mouth?

A. Yeah.

Q. And they heard you talking to your, about your Mom or to -

A. Ah, somebody came by. One of the cops that was walking through and I said, you know, something like - Tell my Mom I'm sorry or something like that, you know, and or I love her, or something like that, and then about, I don't know, twenty (20) or thirty (30) of them pointed guns at me and told me to put that one down and kind of woke me up a little.

Q. And you threw the gun away?

A. Yeah, I threw it behind me.

Q. After the put the twenty (20) or thirty (30) guns on you?

A. Yeah.

Q. Okay.

A. I didn't have a standoff with them.

Q. Well, you had a rifle with a scope on it, is that right?

A. But it was in my mouth. It never was [709] pointed in their direction.

Q. Right.

A. Never. Even when I threw it I made sure it wasn't pointed that way.

Q. The gun wasn't pointed that way. I believe you indicated you in your reports that Ben Lilly went right up into Alexander Defilippis' face, is that right, and shot him -

A. Yeah.

Q. At point blank range?

A. Yeah. Right, right at him, yes. From me to you. Ever bit of it.

Q. All right. If not closer, is that right?

A. Yeah, I guess, a little, a arm, a little over a arm length -

Q. All right.

A. And then the gun length, you know.

Q. Now, was this real close to the car?

A. Ah, it wasn't real far, but it wasn't real close. I, like I said, it was, it was, it was close, but, you know.

[710] Q. And you had the fog lights on, is that right?

A. Yeah. Well, the parking lights, whatever, yeah.

Q. Parking, parking lights?

A. Whatever, yeah.

Q. And you were able to see Ben Lilly at a distance, is that correct?

A. Yeah, it gets dark, but it, ah, ah, there is still a moon out.

Q. So, on, there was a moon out?

A. Yeah.

Q. And then, then you've got the fog lights?

A. Well, they wasn't, they wasn't much help, I don't reckon, but I, yeah, I seen -

Q. And you were able to see this at some distance what was going, what was transpiring?

A. Yes, sir.

Q. I believe you even indicated that Alexander Defilippis put his hand up?

A. Yeah, he threw his arm up (describing).

[711] Q. Mr. Barker, you were able to see that far. Wasn't Alexander Defilippis able to see your face?

A. Ah, I, like I said, he wasn't looking at my face. He was just wanting to go. That's all he was

Q. He never looked at your face?

A. No, he never did. Not that I recall.

MR. TUCK: Your Honor, if I might have a minute.

THE COURT: All right, sir.

THE COURT: And, Mr. Tuck, while y'all are discussing a matter, it's 5:30. Assuming, or let me ask you this, do you have a much more extensive cross?

MR. TUCK: I, I don't know. I know my cocounsel has been making a considerable amount of notes over here, so I'm assuming that there's going to be some -

THE COURT: All right, sir.

MR. JENKINS: Yes, sir, there will be some, just one or two more questions, Judge, and we could call it quits. I think, for today.

THE COURT: But, but you're not through [712] with your cross-examination?

MR. JENKINS: No, sir. Mr. -

MR. TUCK: Your Honor, so if you wanted to break -

THE COURT: All right. So, let's look at a point, let's look at a point that we can break.

MR. TUCK: If, if you, if the Court wanted to break now that would be -

THE COURT: You're satisfied with that?

MR. TUCK: Yes, Your Honor.

THE COURT: Mr. Schwab?

MR. SCHWAB: That's fine, Your Honor.

THE COURT: All right, sir. Mr. Barker, we're going to conclude your testimony for today. I want you to

remain in the witness box and I will admonish you now, as this is your first appearance before the Court, you are not to discuss your testimony or any aspect of this case with any other person whatsoever and from this point on, you're not to read any news account of these proceedings, nor or you to hear or watch any TV proceedings. Do you fully understand that?

[713] MR. BARKER: Yes, sir.

THE COURT: All right, sir. Thank you. If you would take the jury out, but first as they stand let me ask them the usual question. I don't mean to imply that you all can't understand the simple instructions of the Court, but for the record I want to remind you before you leave the same sanctions that have been imposed previous are still outstanding. Do y'all understand that?

JURORS: Answer - Yes, sir.

THE COURT: All right. Thank you very much and you're excused until 9:00 a.m. in the morning, actually 8:45.

THE COURT: I would ordinarily excuse Mr. Barker at this time. Is that an appropriate time for you all? I'm going to give, I'm going to give the jury a chance to get on the elevator.

MR. TUCK: Your Honor, I believe, I don't know if Mr. Schwab has been able to find it, I know he has had other things on his mind, but I believe there was a discovery list that he had, was going through a [714] check list. I don't know if he's got that now, but I was thinking we could use this time while we have the Court and the record just to go ahead and get that in.

MR. SCHWAB: I do, Your Honor, I have some other things to add to the list.

MR. TUCK: Your Honor, I have no problems with that.

THE COURT: All right.

MR. TUCK: I haven't seen the other items, but -

THE COURT: Well, why don't you all confer once we're recessed and if there are any issues there, we'll take them up in the morning.

THE COURT: Mr. Levesque, once the jury is on the elevators, would you indicate that, please. Thank you. All right, thank you. Mr. Weaver, recess Court until 9:00 a.m. in the morning.

BAILIFF WEAVER: Everyone rise. Court is adjourned until 9:00 a.m. tomorrow morning.

[715] OCTOBER 23, 1996

[716] THE COURT: I believe there are some matters the attorneys wish to address to the record. Mr. Tuck.

MR. TUCK: Your Honor, for the record the portion we have objected to the Court's ruling as far as allowing us to get into the Plea Agreement that may have been taking place in Giles County and Floyd County, I would like to put a proffer before the Court and question Mr. Barker as to those Plea Agreements.

THE COURT: All right, sir. Mr. Schwab, anything you wish to add?

MR. SCHWAB: Your Honor, as long as it's clear that that was a Plea Agreement that was not negotiated, nor does Montgomery County's indicate that that sentence is to be concurrent.

THE COURT: All right, sir.

MR. TUCK: Just as a, I'm just curious as to whether it was a fact.

THE COURT: As, as I recall, there is no mention of any other jurisdiction in Mr - Barker's Plea Agreement in, in this court -

[717] MR. TUCK: That would be correct.

THE COURT: And it was on that basis that I made my ruling yesterday to your motion and I'm very hesitant to go outside, but I am going to let you ask the question as to whether or not any agreements reached outside Montgomery County influenced his decision in signing this agreement, but I don't think we'll be able to go much further than that.

MR. TUCK: All right.

THE COURT: Because we are dealing with a Montgomery County Plea Agreement.

Q. Mr. Barker, I'm going to ask you just a couple of brief questions. You've already heard from the Court this morning.

MR. TUCK: No, we don't need the jury. Not for this.

MR. JENKINS: No, this is a proffer, Ben, of what we call evidence, okay? It's a -

THE COURT: No, this is really just grounds for your motion.

Q. You've indicated that there, you had [718] accepted this plea for fifty-three (53) years, is that correct?

A. Yes, sir.

Q. Was a fact for you accepting this Plea Agreement for fifty-three (53) years the fact that Giles County's charge would run concurrent with the fifty-three (53) years as well? Was that a factor in accepting this Plea Agreement?

A. Ah, it had somewhat to do with it, yes.

Q. Was it a factor that the Floyd County charges would run concurrent with this Plea Agreement, was that a factor?

A. No, sir.

Q. But the Giles County charges were a factor to you?

A. Yes.

THE COURT: All right. I'll allow you to ask that -

MR. TUCK: Regarding the Giles?

THE COURT: Uh-huh, but not the Floyd. Just the Giles and whether or not it did have an affect, [719] and, if so, what affect it did have and then I'll allow you, Mr. Schwab, also to question Mr. Barker in that regard.

MR. SCHWAB: Thank you, Your Honor.

THE COURT: Anything further, Mr. Tuck?

MR. TUCK: Nothing further, Your Honor. Thank you, very much.

THE COURT: All right, sir. Thank you.

MR. SCHWAB: Your Honor, as far as that goes, I can do that on redirect.

THE COURT: All right, sir. All right, Mrs. Skidmore, if you'll bring the jury in, please.

THE COURT: Mr. Clerk, if you'll take the jury's attendance, please.

CLERK: As I call your names, please, answer that you are here. Tammy Bukowski: Here. Michael Eyer: Here. David Jones: Here. Ray Lester: Here. Jennifer Loveday: Here. Linda Martin: Here. Lowell McGuyer: Here. Ervin Price: Here. Dianne Proffit: Here. Jennifer White: Here. James Boyd: Here. Tandra Dixon: Here. Lisa Duncan: Here. Charlie [720] Hall: Here.

THE COURT: Good morning, Ladies and Gentlemen of the jury. All right, Mr. Tuck, if you will conclude your cross-examination now of Mr. Barker.

MR. TUCK: Thank you, Your Honor.

#### CONTINUATION OF CROSS-EXAMINATION

BY MR. TUCK:

Q. Mr. Barker, I believe you indicated yesterday that you also faced charges in Giles County, is that correct?

A. Yes, sir.

Q. And was the fact that you were facing Giles County charges, was that a factor in whether you accepted this Plea Agreement or not?

A. Ah, somewhat.

Q. All right. And you were facing, what were the charges that you were facing in Giles County?

A. Ah, two (2) armed robberies.

Q. And two (2) armed robberies. Were there any other charges?

A. Ah, gun charges.

[721] Q. Two (2) gun, two (2) more gun charges?

A. Yes, sir.

Q. Now, I'm a little bit slow on math. Maybe you can help me here. The five (5) to life, that would be six (6) years, is that right? Five (5) plus one (1) is six (6)?

A. Yeah.

Q. Plus fifteen (15), that would be twenty-one (21)?

A. Yes, sir.

Q. That would be forty-one (41). That would be fifty-three (53), in that correct?

A. Yes, sir.

Q. And then on the other side, that would be three (3) life terms and twenty-two (22) years, is that correct?

A. Yes, sir.

Q. Now, going back to the Price's Fork area, did you and Mark Lilly kick Ben Lilly out of the car because he was so drunk?

A. Ah, no, sir.

[722] Q. Did you later pick him back up with Alexander Defilippis' car with Alexander Defilippis in it?

A. No, sir.

Q. Did, down that Whitethorne land was there any struggle that took place between Alexander Defilippis, yourself and Mark Lilly?

A. No, sir.

Q. Was Ben Lilly passed out drunk in the car?

A. No, sir.

Q. I believe you indicated you went to Billy Roop's -

A. Yes, sir.

Q. Trailer Court and that was to purchase marijuana?

A. Yes, sir.

Q. And you were going to use the guns to trade it for marijuana, is that correct?

A. Yes, sir.

Q. And that was for your needs -

A. Yes, sir.

[723] Q. And Mark's needs?

A. Yes, sir.

Q. I believe you said you also went to Cowboys, is that correct?

A. Yes, sir.

Q. And was that to also get dope?

A. Yes, sir.

Q. Was there any place else that you went that day to get dope?

A. Ah, in the same trailer park.

Q. All right. Did, you indicated, were you able to obtain any marijuana that day? I believe you indicated you smoked it. Were you smoking it throughout the evening or just that afternoon?

A. Ah, throughout the evening.

Q. Had Warren Nolen given Ben Lilly Two Hundred (\$200.00) Dollars when you were over in Radford for some work that he had done?

A. No, sir.

Q. Now, I believe you indicated you and, or you at least had food stamps from the first robbery, is [724] that correct?

A. Ah, there was some involved, yes.

Q. Okay. Did you take some of those?

A. Ah, I do not remember.

Q. Okay. Do you know whether Ben Lilly took some of those?

A. I do not remember.

Q. Now, what was taken from the second store in Pembroke?

A. Ah, just money. Ah, a bag of change.

Q. A bag of change. Rolled quarters?

A. Ah, it was rolled, -

Q. Nickels?

A. Yeah.

Q. Pennies, nickels, dimes, quarters, standard change?

A. Yes, Sir.

Q. And did you take that with you when you ran out of the car or did you give that to Ben Lilly?

A. Ah, I don't remember what happened to it. I don't remember who grabbed it.

[725] Q. All right. Do you remember who grabbed the gun out of the car? Did Ben Lilly take the gun out of the car when you were stopped by Randy Tilley?

A. There was, ah, three (3) guns involved. Which gun are you talking about?

Q. The murder weapon?

A. Ah, I didn't have it.

Q. Okay. You did not have it?

A. Not at that time, no.

Q. You just took the rifle, is that correct?

A. Yes, sir.

Q. Did you see Ben Lilly take it?

A. No, sir, I didn't.

MR. TUCK: Your Honor, if I might have a moment.

THE COURT: All right, sir.

Q. Now, I believe you indicated that you could see Alexander Defilippis because it was a moon lit night, is that correct?

A. Yes, sir.

Q. And you saw his actions and you saw Ben [726] Lilly's actions that night, is that correct?

A. Yes, Sir.

Q. And you could see those clearly?

A. Clear as I needed to, yes, sir.

Q. All right. Did Alexander Defilippis attempt to run away?

A. Ah, no, sir, he didn't. He didn't have a chance.

Q. All right. And so he just was shot and dropped straight to the ground?

A. Ah, no, Sir, he threw up his arm (describing).

Q. Threw up his arm first?

A. Yes, Sir.

Q. And you saw that clearly?

A. Yes, sir.

Q. I believe you've indicated on every single occasion on cross-examination that he never saw your face that night?

A. Not to my knowledge. I don't believe he did, no.

[727] Q. And how far away did you see these events occur?

A. Ah, like I said yesterday, it -

Q. Fifteen (15), twenty (20) feet, thirty (30) feet?

A. It was a little bit further than that maybe. Forty-five (45), fifty (50) feet maybe.

Q. Forty-five (45) or fifty (50) -

A. Somewhere around there. I'm not sure, yeah. I was close enough to see it though.

MR. TUCK: No further questions from this witness.

THE COURT: All right, thank you, Mr. Tuck. Mr. Schwab, any redirect?

MR. SCHWAB: Yes, Your Honor.

#### REDIRECT EXAMINATION

BY MR. SCHWAB:

Q. Now, Gary, during the cross-examination they showed you a conviction paper which you said you weren't sure?

A. Yes, Sir.

[728] Q. Is Mr. Showalter still representing you?

A. Yes, sir.

Q. And you still have pending criminal charges in Montgomery County?

A. Yes, sir.

Q. Are you telling the jury that you've never stolen anything?

A. No, sir, I'm not saying that, no.

Q. In fact, you told the police that night you'd stole a lot of things, hadn't you?

A. Yeah, basically.

Q. Now, you still have your charges pending in Giles?

A. Ah, yes, sir.

Q. Did Montgomery County agree to make Giles County concurrent?

A. Ah, no, sir, that was between my lawyer and, ah, Giles County.

Q. And you still have charges pending in Montgomery County you haven't been to Court on?

A. Yes, Sir.

[729] Q. Now, he asked you if you put in, told any of the officers you'd been to Radford?

A. Yes, sir.

Q. Did you commit any crimes in Radford?

A. No, sir. None other, none other than getting high.

Q. And do you recall telling, whether or not you told Deputy Price anything about getting out of the vehicle at Whitethorne? About how you did it and why you did it that way?

A. Ah, yes, sir.

Q. And what did you tell him?

A. Ah, I told him that, ah, we had, ah, that boy closed his eyes, ah, because a overhead light comes on in the car, and, ah, we got out, then, ah, he got out.

Q. And did you tell Detective Goodman that?

A. Yes, sir.

Q. And did you tell investigators Hamlin and Fleet?

A. Yes, sir.

Q. But you may not have told them that you'd [730] put your head down when you got in the car?

A. Ah, no, sir, I might not have. I'm not sure.

Q. Now, in Eggleston did you tell the, Mr. Barnett, what did you tell him to do after you came in with, and showed the gun?

A. I told him to, ah, get on the floor.

Q. And did he do that?

A. Yes, he did.

Q. Now, in Pembroke at Mr. Williams store -

A. Yes, sir.

Q. You and Mark went in?

A. Yes, sir.

Q. And where was Ben?

A. In the car.

Q. Did you see where he was in the car?

A. He was in the driver's seat waiting for us.

Q. And you were in the store a little bit longer than you thought, is that right?

A. Yes, sir.

[731] Q. And Mr. Williams came in?

A. Yes, sir, rushed me from behind.

Q. And Ms. Hylton told you she didn't have any money?

A. Yes, sir.

Q. And when you came back out, was Ben Lilly still in the driver's seat of the car?

A. Yes, sir.

Q. Was the car running?

A. Yes, sir.

Q. Now, Mr. Tuck asked if you all kicked Ben out and didn't pick him up until after you had Mr. Defilippis?

A. Ah, he had been with us the full time. Through it all.

Q. And he wasn't passed out either?

A. No, no. Not at all.

Q. And you bought beer how long after you left where you, Mr. Defilippis was killed?

A. It's not even five (5) minutes up the road really as fast as we was moving.

[732] Q. Was there anything else that was lighting up the area that night when Alexander Defilippis was shot?

A. Ah, it wasn't pitch dark, I do not remember. It was, it had enough light to see.

Q. Did you tell the jury whether or not you heard the shots?

A. Yes, I told them I, I didn't hear the shots. I just seen the flashes.

Q. What kind of flashes?

A. Just quick flashes like, I don't know, like a camera flashing sort of.

Q. Did it light up anything?

A. Ah, just a flash. I don't really know how to explain it.

Q. Could you see better at the flashes than you could before?

A. Umm, not really.

Q. And after he threw his hands up, what happened to him?

A. Ah, he stumbled back and Ben shot him [733] again.

Q. You'd been with Ben every since the day before, right?

A. Ah, yes.

Q. And you went to Mr. Nolen's that night?

A. Ah, the night that we had robbed the house in Floyd, yes, sir.

Q. Okay. You didn't see Ben spend any money after he'd been to Mr. Nolen's, did you?

A. Ah, ah, no, sir, we was all broke. That's why we robbed the stores.

Q. You didn't have any money for gas down in Shawsville?

A. Ah, no, sir.

Q. Ben didn't offer to pay for it?

A. Huh, he didn't have any money that I seen or heard of.

Q. Did Ben buy anything at Cowboys?

A. Ah, no, he sure didn't. None of us went in.

Q. Ben give you any money?

[734] A. Huh, no, sir.

Q. Did you see Mark give him any money?

A. Huh, no, sir. Only when we split the money up after the robberies.

Q. Thank you.

THE COURT: Thank you, Mr. Schwab. Any questions on recross, Your Honor.

MR. TUCK: No, Your Honor.

THE COURT: All right.

MR. TUCK: We would subject to recall though, Your Honor.

THE COURT: All right. Thank you.

MR. SCHWAB: Your Honor, could we have a short recess to see if one of my witnesses has gotten here?

THE COURT: Yes, sir. And, Mrs. Skidmore, if you'd take the jury back to the room, please.

THE COURT: Please take Mr. Barker from the stand and, Mr. Tuck, since the examination of Mr. Barker is completed, if you would put your exhibit down, [735] please.

MR. TUCK: Yes, I will, Your Honor.

THE COURT: All right, thank you.

MR. JENKINS: Are we in recess now, Judge?

THE COURT: Yeah.

THE COURT: All right, Mr. Schwab, call your next witness, please.

MR. SCHWAB: Danny Sanders.

LT. SKIDMORE: Do you want him sworn again, Judge?

THE COURT: Yes, uh-huh.

CLERK: Do you swear the evidence and testimony you give in this matter to be truth, the whole truth and nothing but the truth, so help you God?

DANNY SANDERS: I do.

THE COURT: Thank you, Mr. Sanders, and if you'll have a seat there and please once again answer the attorneys questions.

DANNY SANDERS RECALLED  
DIRECT EXAMINATION

\* \* \*

Testimony of Mark Wilburn/Direct

[747] Q. Did there come a time when one of the persons arrested used the loud speaker?

A. Yes, there was.

Q. Was that after you came back?

A. Yes, it was.

Q. And which one of the persons arrested used it?

A. Ah, Ben Lilly.

Q. The gentleman in the middle over to your right?

A. Yes, it is.

Q. And he was allowed to use it?

A. Yes, he, he asked if he could use it to talk his brother

Q. All right.

A. Out of the woods.

Q. So, there had only been two (2) arrests at that point?

A. Yes, there was.

Q. And where were you while he was using it?

A. I was just behind the car where he was at.

[748] Q. All right. Did you hear what he said?

A. Yes, I did.

Q. Would you tell the jury what he said over the loud speaker?

A. He kept calling his brother by name and said, Mark, you know, come on out, you know, don't let them kill you. You're not the one that's really in trouble here. You're not the one that's, or the one that's really done anything wrong.

Q. All right. And that was said by Ben Lilly over the loud speaker?

A. Yes, it was.

Q. Now, Mark wasn't located in that area, was he?

A. No, he was not.

Q. Thank you. Answer any questions defense counsel may have.

THE COURT: Mr. Jenkins.

CROSS-EXAMINATION  
BY MR. JENKINS:

Q. Ah, Officer Wilburn, now, do I understand

\* \* \*

Testimony of Bill Whitsett/Direct

[754] A. Yes.

Q. Were you working in the evening?

A. Yes. Well, I was not working, I was called out.

Q. And about what time were you called out?

A. Around, sometime after 7:00 p.m.

Q. All right. And why were you called out?

A. It had to do with some armed robberies that occurred in the county.

Q. Now, did you put on your uniform?

A. No.

Q. You went to the scene?

A. Yes, I went to the scene.

Q. Okay. And when you got there, what was going on?

A. Ah, when I arrived there was a, one of our units, Unit 106 was driven by Officer Tilley and he had a subject in custody at the rear of his police car.

Q. In the back seat?

A. Yes.

Q. All right. And there were other officers [755] present?

A. Yes.

Q. And what were the other officers doing at that point?

A. Ah, at that time they were looking for suspects.

Q. Were you present when a second suspect was located there at the scene?

A. Ah, he was located, but out of my sight.

Q. Okay. So, that happened while you were there?

A. Yes.

Q. And did you remain there for how much longer after that?

A. Oh, about a hour, hour and a half or so.

Q. And what function were you performing as a law enforcement officer while you were there that time?

A. I was pretty much standing guard for Mr. Ben Lilly.

Q. Is that the person that was in Mr., your officer Tilley's vehicle?

[756] A. Yes.

Q. And where and how were you standing guard?

A. I was standing outside of the vehicle, ah, adjacent to the back door of the car.

Q. On the side he was on?

A. Yes.

Q. Were any of the windows up or down on the vehicle?

A. The window was down five or six inches or so.

Q. Was Mr. Lilly restrained in any way at that time? Handcuffs, leg irons?

A. No leg irons. I don't recall, I think there were handcuffs. There were handcuffs, yes.

Q. And while you were standing guard, did Mr. Lilly ask you anything?

A. Yes, he did.

Q. Where in the sequence of events would that have been? After you got there after the second suspect was found -

A. It, it was after the second suspect was [757] found, yes.

Q. All right.

A. He called me over to the car.

Q. And how did he do that?

A. He, ah, asked me to come over to the car that he had a special request for me. He asked me if I would do

him a special favor. He asked me if I wanted to put the barrel of my gun, shotgun, ah, in his mouth and pull the trigger.

Q. You were holding your shotgun at that time?

A. Yes.

Q. And what did you say?

A. I said that, ah, I couldn't do that. He knew that I couldn't do that and I asked him to, ah, asked him if I looked like a murderer.

Q. And then what did he do?

A. He, he said something at that time and he sat back in the car and -

Q. Did you hear what he said?

A. Ah, not precisely, no.

[758] Q. All right. And then what did you do?

A. Well, he, he said something to prompt me to ask and I said what does a murderer look like anyway. I don't recall exactly what he said, but it, that lead to that question.

Q. And did he make a response to that?

A. And he said that, ah, he set back in the car again and he said, me.

Q. Did he say it loudly?

A. He, he said it loudly enough to where I could understand what he, it sounded like he said me to me.

Q. All right. And after you heard that, what did you do?

A. I said that, ah, I asked him what did he say? And he said that, ah, he was going to hell to meet his brother.

Q. Did he tell you why he thought his brother may be in hell?

A. Ah, he said that his brother committed suicide some eight years earlier. It was that, a matter [759] of fact on the 12th of December, and that, ah, he was probably going to meet his brother in hell.

Q. And when you went out that night, did you know, what crimes were you aware of?

A. At that point in time, the only crimes that we were aware of that they were suspected suspects in an armed robbery that occurred in Giles County.

Q. You didn't know anyone had been killed at that point?

A. No.

Q. Did you know anybody had been shot at that point?

A. No.

Q. And the person that asked you for this special favor, is he in the Courtroom?

A. Yes, he is.

Q. Would you point him out, please?

A. That's Mr. Lilly right there.

Q. The one in the middle?

A. Yes.

Q. Thank you. Answer any questions Mr. Tuck [760] or Mr. Jenkins may have.

THE COURT: Mr. Tuck.

#### CROSS-EXAMINATION

BY MR. TUCK:

Q. I believe under direct examination you indicated that it was about 7:00 when you got called out, is that correct?

A. Sometime thereafter 7:00 p.m.

Q. And do you recall testifying at a proceeding before this? Do you remember indicating it was about 9:00 when you got called out?

A. I said it was after 7:00.

Q. Okay. Was it 9:00? Is your memory -

A. It was dark. It was the 12th of December, ah, sometime after 7:00 p.m., yes.

Q. All right. Now, was the motor running on this vehicle?

A. Yes.

Q. All right. And so the window is down about five inches, is that correct?

A. Approximately, yes.

[761] Q. And I believe you indicated that you had trouble hearing when he, at different points in time, the conversation, is that correct?

A. That's correct.

Q. And when he made this statement, now, why were you having difficulty hearing him before this date?

A. Ah, it had a lot to do with the volume of his voice, -

Q. All right.

A. I would guess -

Q. The -

A. Running of the car. The fact that the window was cracked five or six inches itself.

Q. All right. Did it have anything to do with you standing back away from the car at times?

A. Ah, some times, I would pull away from the car, yes.

Q. And were you standing back away from the car when he made that statement?

A. What statement is that?

Q. Me? The me statement?

[762] A. Ah, I was close enough to hear what he had said.

Q. Were you standing back where you had had trouble hearing him prior when he made that statement?

A. No, I was pretty close to the car then because we were engaged in a conversation.

Q. Do you recall your testimony at a prior proceeding?

A. Yes.

Q. And do you recall indicating that you were back away from the car?

A. I had backed away, yes.

Q. All right. So, you were back away where you had had trouble hearing prior to this, is that correct?

A. Yes.

Q. And I believe now you've indicated from your statement that you said in, on, that you gave Gary Price, do you have that statement?

A. Yes, I do.

Q. And you have that in front of you?

[763] A. Yes, I do, sir.

Q. And Page 2.

A. Okay.

Q. At the top, I backed away from the car -

A. Uh-huh.

Q. And I thought I heard him say me.

A. That's correct.

Q. Is that a correct statement?

A. That's correct.

Q. So, on December the 7th, you thought he heard, -

A. That's correct.

Q. You heard? Did you make any other statements to law enforcement officers that you're aware of?

A. Hum, not that I'm aware of, no.

MR. TUCK: All right. I'm going to show him a case summary from Giles County. I believe it was prepared by Gray Price.

MR. SCHWAB: For what purpose, may I ask?

\* \* \*

[773] well as your grounds and argument, Mr. Tuck.

MR. TUCK: Your Honor, we believe that the Commonwealth will be calling Mark Lilly to the stand. He may or may not take the Fifth Amendment because some of his statements might incriminate him. That question, if he does not take the stand, it is our understanding that the Commonwealth intends to simply introduce transcripts that conspired or, between police officers and statements made by Mark Lilly. We believe that it's, if that is done that that will violate the confrontation clause of the Sixth Amendment as guaranteed to all citizens through the Fourteenth Amendment of the United States Constitution. Ben Lilly has a right to look at his accusers in the face and the jury has the ability to look at his accusers in the face and see, and, and the jury has the ability to look at that person and see if they're telling the truth. Clearly, if that is done, these statements are entered, then he will not have the ability to confront his

accusers. Your Honor, we will not have the ability to ask Mark Lilly why he says that the shooting took place ten to fifteen yards away and [774] Gary Barker said they took place point blank. I won't have anybody to cross-examine. Your Honor, he indicates in one of his statements that he had money in his pocket and he could have paid for the beer that was done and that he didn't need to rob it. But in the other statement that he gives to Officer Hamlin, he says, no, I don't have, I, we, were broke. Clearly, these statements have inconsistencies. They are self-serving as well. If you look at the motion that I filed with the Court, he indicates he was so drunk he doesn't remember. That it wasn't he, ah, that, ah, did anything wrong, it was Gary Barker and Ben Lilly doing things wrong throughout the course of this evening. He says he was so drunk he doesn't remember. At any key point, did you know that they were going to go in and rob it? No, it, or it was their decision. I had money to pay for it. Did you know, did you handle the guns that evening? No, and the Court's already seen evidence that the pistol was seventy-five feet down behind the car. It had to get there somewhere, Your Honor, and Gary Barker has already testified that he didn't take it down there, so this is [775] another inconsistency with Mark Lilly's statements. Mark Lilly is trying to put himself off as just a, a, being intoxicated and not doing anything wrong in this case whatsoever. That is not an acceptable, ah, exclusion for a, the confrontation clause. It has to be against his own penal interest and the statements that he has given put him far away from the crime. They do not talk about the fact that he did. What did he do in Montgomery County? Well, I had to get in the car because I was so drunk. I didn't

want to get left behind. Not that I knew what was going on. Which is totally inconsistent with what Gary Barker's testimony has been, and, Your Honor, I won't have anybody to cross-examine and he has that right based on the Sixth Amendment and when he gets in that stand, we won't be able to cross-examine and that's why it's so important to our system for the, when the, a jury to look at that witness and be able to say, there's discrepancies in their testimony. I won't be able to ask Mark Lilly, did you possess this money clip? I won't be able to do that because I don't have the right to confront him. My client has been denied that right if [776] the Court rules against us. That's why it's so important. We're talking about a murder trial and we're talking about whether a man lives or dies. This is not a shoplifting case and I am asking this Court, I am imploring this Court allow us the right to confront the witness and if we don't have that right, then to keep the statements out. Thank you, Your Honor.

THE COURT: Thank you, Mr. Tuck. Let me ask you a question. What is your argument if Mr. Lilly, I'm talking about Mark Lilly, -

MR. TUCK: Yes, Your Honor.

THE COURT: If he is available, the Commonwealth calls him as a witness, he is sworn, he is seated in the witness chair, and then he takes the Fifth Amendment against self-incrimination. Where is your argument as to whether such circumstances make him unavailable?

MR. TUCK: According to Virginia case law and Federal case law, that would make him or deem him to be unavailable. However, Your Honor, we believe that, frankly, we believe that the Virginia State Supreme Court

[777] is wrong. It ruled in it's evidence that this, the whole statement could come in. Not just the statements against their penal interest, but the whole statement. If you look at the way the Federal courts interpret their own rules of evidence and the way that they have interpreted the confrontation clause, they only are allowed to look at the statements that incriminate them and if they get up, because that's where the reliability is. If Mark Lilly would have gotten up and said, I did something wrong here, that portion of the statement can come in. I did something wrong, but that's not what, that's not what the Commonwealth I, we believe again, that's not why they're going to be offering it. They're going to want to be offering it for the truth of the matter that Ben Lilly did something wrong and when that is done, we're talking about how, how, anything I say, if I got up in my opening argument or in closing argument and say, Mark Lilly says it's thirty, ten yards, fifteen yards, that would be thirty to forty-five feet and Gary Barker says that it's, ah, ah, point blank range. Your Honor, I don't have anybody to cross-examine. Anything that I say [778] is not evidence. I don't have anybody, any way of pointing that out because there is no one on the stand for me to cross-examine.

THE COURT: Thank you, Mr. Tuck.

MR. JENKINS: Your Honor, could I just give the Court a couple of cases I think will be on -

THE COURT: Mr. Tuck may insofar as this motion is concerned.

MR. TUCK: Your Honor, I -

MR. JENKINS: Okay.

MR. TUCK: Omitted just for the record *Douglas v. Alabama*, -

THE COURT: And that has already been submitted and reviewed by the Court -

MR. TUCK: I believe that's correct. *Brutan v. United States* -

THE COURT: That has been submitted and reviewed by the Court.

MR. TUCK: I believe *Crews v. New York*. I also believe I had submitted to the Court two other cases. That was an *Idaho v. Wright* and just to [779] briefly discuss *Idaho v. Wright*, Your Honor, while we're talking about some of the case law, that case was, involves a rule in Idaho that said there is a general hearsay that if it's reliable, the Court can have, let it in. And the Supreme Court said that's not a well-founded reason. One of the defendants objected as to hearsay. That defendant is still incarcerated. The other defendant objected as to the Sixth Amendment right to confrontation. The Supreme Court overturned that person's conviction is my understanding.

THE COURT: All right. Thank you, Mr. Tuck. Mr. Schwab, any response to the defense's argument?

MR. SCHWAB: Well, Your Honor, assuming that Mark Lilly will be unavailable because he takes the Fifth Amendment, his Fifth Amendment rights and refuses to be compelled to testify on matters that may incriminate him. The Commonwealth's view of the law is that while the defendant has a Sixth Amendment right it

has been consistently held that that right does not override everything else, including and mentioned [780] specifically in the *Idaho v. Wright* that it doesn't override and they have refused to say that it will override other exceptions in evidence. They, the rule essentially is that evidence primarily of co-defendants in this case, well, let me back up, the rule is, matters may come in the Court that would violate the Sixth Amendment Confrontation Right if there is, in their terms, a well-rooted basis for admission of hearsay and that was pointed out several times in the *Idaho case* because the *Idaho case* involved a statutory residual hearsay. That's what the case was about as the Court knows. That's what the argument was over and the Supreme Court of the United States in that case held that residual hearsay was not sufficient enough to be what they called a well-rooted exception to the hearsay rule. In this case, it has been held for years and years in this jurisdiction as well as others and as Mr. Tuck pointed out, it is admissible even under the Federal Rules of Evidence for statements against penal interest. We would submit to the Court that that is a well-rooted basis for admission of hearsay. The Virginia Rule is [781] that the whole statement can come in. The Court has seen in the *Scaggs case* and the *Chandler case* which discussed what part could come in and whether or not it was incriminating and what made it against a person's penal interest. It didn't have to be a full confession essentially as long as it put them in jeopardy of prosecution. That being the case, it would appear that if he is unavailable, there is an exception to the hearsay which would allow those statements in and that it would not violate his constitutional rights based on the current status of the law. As far as I can tell,

the U.S. Supreme Court has never had the issue nor made a ruling on whether or not a state well-rooted basis for admission of statements by an unavailable declarant concerning their penal interest is or is not a well-rooted matter. Certainly they had something in mind when they used that term and those would, one would assume from the cases below, from the Virginia cases on that point that, in fact, that's what they were looking to and while the case the defense has cited concerning the Federal Rules of Evidence, it did mention the [782] confrontation clause and if I remember correctly, they ruled only that part of the statement could come in under the Federal Rules of hearsay. They did not make the Federal Rules of Evidence due process requirements upon all the states of the United States of America. Only in their Courts where their rules were they said that's the rule they will use and how they will allow the information in concerning that hearsay exception and the current state of the law is that it's admissible and one other thing I'd like to say, Judge, that I'm sorry that the law of this Commonwealth should be different for murderers than for shoplifters, but I believe it should be the same no matter what the case is and it should not be argued or ruled upon by the Court simply because it's a murder case rather than a shoplifting, you ignore the current state of the law.

THE COURT: All right, Mr. Schwab. Let me ask you the same question that I asked Mr. Tuck. What is your argument as to whether or not Mark Lilly is available if, in fact he's sworn, takes the witness stand and responds, ah, by taking the Fifth Amendment against [783] self-incrimination. What is your opinion as to

whether or not in terms of Virginia president, precedent that he is available or unavailable?

MR. SCHWAB: I cannot point to anything in the two cases I provided you, but it is my understanding of the law that one of the ways, although it may have been in FRIEND, I believe, noted with a citation that if a person does take the Fifth Amendment and cannot be compelled to testify, then that person is unavailable, ah, for testimony.

THE COURT: All right, sir. Thank you. Mr. Tuck, you have the burden on this motion, so I'll let you -

MR. TUCK: Your Honor, actually I believe that you, I, while we're making the Motion in Limine, I believe the burden always remains on the Commonwealth.

THE COURT: Well, the burden is on the Commonwealth, but what I meant to say is you, you are making this motion.

MR. TUCK: Your Honor, one of the [784] points that the Commonwealth brought up is this declaration against penal interest. Where is this a self-serving statement? Look at the, we're here for a charge of capital murder, abduction, robbery. Look at the statements as to those events and it don't incriminate him. He says he goes along just because he was drunk and didn't want to be left behind. He really didn't know what he was doing. Look at the statements that he gave. Is that the same reliability that the Commonwealth that, that even the Virginia Supreme Court cases have said, there has to be some reliability here before we're going to let a hearsay

statement in and trample over the defendant's rights and when you start looking at the, he made statements, he didn't, ah, he can't remember if he had any guns or not because he was too drunk. Ah, he gives, we know that at one point in time that he, he mentions that the fact that he didn't indicate he wanted to commit any robberies. That it was just they wanted to do it. He, he keeps pushing the blame away from himself and that's not a declaration against the penal interest. That's a self-serving [785] statement. Now, the Commonwealth may argue, well, just because he's drunk doesn't mean that he wouldn't be an accomplice, but if someone is unconscious or because he indicates that he was blacking out that might make, that might be a defense. Clearly, Your Honor, as I stated earlier, we believe that this would be a violation of his rights and this is an important right. Thank you, Your Honor.

THE COURT: Thank you, Mr. Tuck. We'll be in recess for about ten minutes to consider your arguments.

MR. JENKINS: Your Honor, you'll be back by yourself, is that correct, in considering it?

THE COURT: Yes, sir.

MR. JENKINS: I'm going to make a telephone call.

THE COURT: Without any coaching from the principals in this matter.

MR. JENKINS: Thank you, Judge.

MR. TUCK: Thank you.

BAILIFF WEAVER: Everyone rise.

[786] MR. TUCK: Your Honor, on the record, Mr. Jenkins has stepped out to make an important phone call. We're only here to allow the jury to be released and I have spoken with my client and he has no objections to us simply going ahead and releasing the jury, ah, for lunch.

THE COURT: All right, thank you. I have given in. It seems like every party in interest here wants a lunch recess and I was hoping we could go a bit longer since the jury has been in recess for sometime and I know when I, it's time to give up and that time has come. If you'll bring the jury in, please.

THE COURT: Ladies and Gentlemen of the Jury, I have been persuaded that now is perhaps the appropriate time to take a lunch break and I've given in to the way of all the principals in this matter and I am going to declare a recess now for lunch and we will return at 1:00, and once again, the admonishments that I've given you each time are still in effect. Thank you. Mrs. Skidmore, would you take them out for lunch, please?

LT. SKIDMORE: Please remain in the [787] Courtroom until the jury gets out.

THE COURT: All right, Mr. Weaver, if you'll recess Court until 1:00. If you'll just tell me when they're on the elevator.

THE COURT: Mrs. Cole, for the record that the response to the defendant's motion is made outside the presence of the jury. Gentlemen, in response to the defendant's motion and considering the arguments herein, as

well as the case law submitted by both parties, the Court finds as follows:

The Commonwealth has the burden to prove the unavailability of Mark Lilly as a witness. Should the Commonwealth call Mark Lilly, if Mark Lilly is sworn and if Mark Lilly takes a seat in the witness box and thereafter refuses to answer any questions asserting his Fifth Amendment Right against self-incrimination, then in those events, the Commonwealth has met its burden in showing the unavailability of Mark Lilly as a witness. If on the other hand the Commonwealth does not call Mark Lilly as a witness, then her burden would not be met and these statements will not be admitted pursuant to the [788] hearsay rule. It's well-settled in this Commonwealth that a declaration against penal interest is a recognizable exception to the hearsay rule. However, such a declaration is admissible only upon showing that the declaration is in fact reliable. And in considering whether or not such statements made by Mark Lilly to the officers is reliable and trustworthy, the Court looks at the evidence and exhibits before it and the facts and circumstances of this particular case. In addition, the Court further looks to examine whether there is any other substantial link to connect Mark Lilly with the crime other than the statements that are at issue here. In so doing, the Court finds that Mark Lilly's statements weren't against his penal interest and that they are reliable and trustworthy. Further, the Court finds that these statements do not violate the confrontation clause when they are admitted as hearsay under the quoted exception, which is firmly rooted.

The Court will, therefore, following the precedent established within this Commonwealth, admit these statements in whole. If you want to note your objections?

[789] MR. TUCK: Your Honor, we would note our objections based on the Sixth, Eighth and Fourteenth Amendments based on the grounds that I have already stated. We would also, it's my understanding that the Commonwealth will be playing the tapes. If the Court would, and I believe the Commonwealth would agree, we do have copies of the transcripts of these tapes. We were, they were never in the Commonwealth Attorney's file and they were not provided to us under discovery, the tapes themselves, and we would object to the tapes being played before the jury because we did not receive them and based on *Brady* I believe we are required to receive them and we would ask the Court not to allow them into evidence.

THE COURT: All right, sir. What I will do, Mr. Tuck, is allow you time to review the transcript.

MR. TUCK: Your Honor, the transcripts is one thing, but the voice inflections as far as on the tape they may have been exculpatory, they may be exculpatory, I don't know. The Commonwealth I do not believe ever had these in his possession, but as the

\* \* \*

[798] THE COURT: All right, gentlemen, we need to set up a place in which you can review those tapes.

MR. TUCK: Is that part -

MR. SCHWAB: The tapes and a speaker are available and the witnesses are in the next room.

THE COURT: All right. Is the speaker and the tapes, I mean the speaker, -

MR. SCHWAB: Yes, but considering the proximity to the jury it might be better if they meet some place else.

THE COURT: What about the attorneys' lounge?

MR. TUCK: Why don't we use one of the rooms over here or the lawyers' lounge. That would be fine, Your Honor.

THE COURT: That would be fine or you can do it in Mrs. Cole office and obviously we want be a party, but I imagine the lawyers' lounge would be more appropriate. All right, Mr. Schwab, would you make them available -

\* \* \*

#### Testimony of Mark Lilly/Direct

[804] THE COURT: All right, Mr. Clerk.

CLERK: Do you swear the evidence and testimony you give in this matter will be the truth, the whole truth and nothing but the truth, so help you God?

MARK LILLY: Yes.

THE COURT: Thank you, sir. Have a seat there, please, and answer questions on behalf of the Commonwealth and questions on behalf of the defense.

MARK LILLY, A WITNESS OF LAWFUL AGE,  
AFTER FIRST BEING DULY SWORN, DEPOSED AS FOL-  
LOWS:

DIRECT EXAMINATION  
BY MR. SCHWAB:

Q. Would you tell the judge and the jury your name, please?

A. Mark Lilly.

Q. Mr. Lilly, I want to direct your attention to December the 4th and 5th of last year. Were you with Benjamin Lilly and Gary Barker?

A. I'd like to take the Fifth on that.

[805] Q. Did you, don't wish to answer any questions?

A. Yeah, I'll take the Fifth.

Q. Thank you.

THE COURT: All right. Any questions based upon his response?

MR. JENKINS: Your Honor, we, would you be willing to answer questions for the defense?

A. No, I'd have to take the Fifth.

THE COURT: All right, sir. Anything else, Mr. Schwab?

MR. SCHWAB: Not for this witness, Your Honor.

THE COURT: All right, sir. if the jury would go out just a moment, please. Y'all will lose five pounds this afternoon from, from your exercise.

THE COURT: All right, gentlemen, by Mr. Mark Lilly's assertion of his Fifth Amendment Rights, after having been sworn and after having taken the witness stand and assuming the protection of those rights, then the Court does find that the Commonwealth [806] has met its burden in determining the unavailability of his testimony, so, therefore, in conjunction with the Court's prior ruling that finding is made.

MR. TUCK: Your Honor, that's a continuing ongoing objection. Your Honor, we reserve the right to recall this witness. He may at some point in time elect not to and I believe we have the right to recall him and he may or may not testify in the future. It all depends.

THE COURT: That's correct. All right, Mr. Lilly, you are excused subject to recall with the admonishments that you are not to discuss whatever testimony you gave with any other individual nor allow them to make any conversation with you concerning what you have said on the stand nor or you to hear, view nor read any accounts, news accounts of your testimony. All right, sir. Thank you.

MR. SCHWAB: At this time, may he be returned to the Giles County authorities?

THE COURT: If you do intend to recall him, -

\* \* \*

[809] midnight, if I'm correct?

A. Yes, it was 9:47 on December the 5th.

Q. And you've testified that you spoke with, in the course of your investigation, the defendant, Benjamin Lilly, at about 4:00 in the morning? I think the official time is 3:55 a.m.?

MR. TUCK: We'll be willing to stipulate that so Mr. Price does not have to go through his notes or something to that effect.

Q. All right.

A. That sounds correct, yes, sir.

Q. Did you also in the course of that night, early morning speak with Mark Lilly?

A. Yes, sir, I did.

Q. And where was that?

A. It was at the, in the interview room at the Sheriff's Office, investigation section.

Q. Was he under arrest at the time?

A. Yes, he was.

Q. Was your interview with him taped?

A. It was, yes, sir.

[810] Q. Did you request while the tape was running a waiver of his Miranda Rights?

A. Yes, sir, I did.

Q. Was there also a written waiver?

A. Yes, sir, there is.

Q. So, you advised him that anything he might say could be used against him?

A. Yes, sir, I did.

Q. Have you also had that tape transcribed? That interview with Mark Lilly transcribed?

A. Yes, sir, I have.

Q. Have you reviewed your transcription?

A. I have.

Q. And is it accurate?

A. Yes, sir, it is.

Q. Do you have the tape with you at this time?

A. Yes, I do.

Q. Would you set it up to play?

MR. SCHWAB: Your Honor, I believe defense has been provided with copies of the transcript.

[811] MR. TUCK: Your Honor, again, -

THE COURT: I understand you have.

MR. TUCK: Again, it's a continuing ongoing objection.

THE COURT: All right, sir, but you have been provided -

MR. TUCK: But we have been provided copies -

THE COURT: With a copy of the transcript?

MR. TUCK: Of the transcript, not -

MR. SCHWAB: What is the objection?

MR. TUCK: Not of the tapes I believe is what I was going to say.

MR. SCHWAB: Don't turn it on quite yet.

Q. Did you just a short time ago have a chance to look over your transcript again?

A. I have reviewed it today, yes.

Q. Would you look and see if that's an accurate copy of the transcript?

A. Yes, it is.

[812] Q. Thank you.

MR. SCHWAB: At this time, Your Honor, there are three copies and one for the Court, one for the Court Reporter and one for the Clerk, as well as twelve other copies, oops, I need fourteen, and that's what the other two are for. Fourteen copies, I'm sorry, Your Honor. If they could be passed out for the jury to be used as a guide in listening to the tape.

THE COURT: All right, sir. Thank you. Mrs. Cole, do you have a copy?

COURT REPORTER: Yes, sir.

THE COURT: All right. Mr. Schwab, if you're one short, I have a copy up here.

MR. SCHWAB: Not of this one. The next one, Your Honor. Fourteen passed out of my head today and I was thinking twelve all the way.

THE COURT: All right.

MR. SCHWAB: And if anyone sees, since I didn't have a chance to review the copies, if there's a page missing, if they would, please, raise their hand and I'll try to correct the problem.

[813] THE COURT: The pages are numbered consecutively, so that would be a way to determine whether or not a page is missing.

THE COURT: I've got an extra copy here, if that helps.

MR. SCHWAB: Is anyone still missing one? There should be twenty-nine pages.

THE COURT: All right. Go ahead and proceed.

MR. SCHWAB: Thank you, Your Honor.

Q. If you would, investigator, play the tape you made of that conversation on the early morning hours of December the 6th.

TAPE PLAYED INTO RECORD - INTERVIEW WITH MARK ANTHONY LILLY, DECEMBER 6, 1995, AT THE GILES COUNTY SHERIFF'S OFFICE - INTERVIEWER LIEUTENANT GARY PRICE

Q. Investigator Price, there were occasionally other voices. Were they other people in the room with you?

A. No, sir, that's an adjoining room and the mike is a pretty sensitive mike.

\* \* \*

Case# 950789 &  
950790

Interview With  
Mark Anthony Lilly  
December 6, 1995  
At the Giles County Sheriff's Office

Interviewer: Lieutenant Gary Price

Interview With  
Mark Anthony Lilly

Interviewer: Lieutenant Gary Price  
Date: December 6, 1995  
Time: 1:35 AM

G.P. State your full name.

M.L. Mark Anthony Lilly.

G.P. Okay Mark, you need to speak up just a little bit cause I can't hear very well. Mark Anthony Lilly?

M.L. Yeah.

G.P. Spell your last name.

M.L. L\*I\*L\*L\*Y

G.P. What is your mailing address, Mark?

M.L. Post Office Box 217, Riner Virginia.

G.P. What's your date of birth?

M.L. 6/28/75.

G.P. And your social security?

M.L. 232-08- . . .

G.P. Whoa, whoa, whoa.

M.L. 232-08-3596.

G.P. 232-08-3596?

M.L. Yeah.

G.P. Mark I brought you in the interview room about ten minutes ago and advised you I'd like to ask you some questions concerning some incidents that took place tonight in our county. And you initially said that you felt like you were still under the influence and that you were not feeling very well. We went downstairs, you asked for some water, and received ice water, and during that time you tell me now that you feel like that . . .

M.L. Well, I'm not.

G.P. that you're in your facilities where you understand and you don't feel too drunk to talk to me. You understand the things that I'm gonna ask about. First off, I'm gonna read the Miranda rights that you have to you, and I want to make sure you feel like you understand these.

M.L. Alright.

G.P. **You have the right to remain silent.** That means you don't have to talk to me if you don't want too. **Anything that do you tell me, I can and will use against you in the court of law if there is charges brought against you.** **You have the right to talk with an attorney and have him or her present with you while you are being questioned.** And if you cannot afford to hire an attorney, one will be appointed to represent you before any questioning. **You can decide at any time to exercise these rights and not answer any further questions or make any further statements.** In other words, you got a right to have a lawyer here with you. If you can't afford one, the court appoint one, and if you

decide to waive your rights and talk to me, then you can still stop at any time you want too. You understand these rights?

M.L. Uh huh.

G.P. I'm sorry, you do understand them?

M.L. Yeah.

G.P. Alright, listen to this very carefully. Having been advised and fully understanding my rights do freely and voluntarily, without threats, promises, pressure, or coercing agree to talk with Gary Price, that's me, a law enforcement officer. In other words, if you agree to answer questions, it's not because I'm making you do it, I'm not threatening you, you're gonna do it on your own free will. Do you understand that?

M.L. \*\*No Statement Made\*\*

G.P. If you would, say yes or no.

M.L. Yeah.

G.P. Are you willing to answer questions concerning two armed robberies that occurred in Giles County tonight and incidents that led up in Blacksburg and Montgomery County earlier today, or earlier on December the fifth?

M.L. Yeah.

G.P. When was the last time you had a drink?

M.L. Well, ah . . .

G.P. It's right now, 1:30.

M.L. About dark.

G.P. About dark, which would have been about five or six o'clock. So we're talking about seven and a half hours.

M.L. We'd been drinking liquor all day, since yesterday.

G.P. When you say "we" who are you talking about "we"?

M.L. Me, Ben and Gary.

G.P. Who's Ben now?

M.L. That's my brother.

G.P. Ben Lilly?

M.L. Yeah.

G.P. And Gary, who's Gary?

M.L. Barker.

G.P. You any kin to Gary Barker?

M.L. No.

G.P. I'm going to ask you, if you would, these are the rights that I read you, and then I asked you if you understood these rights and was willing to waive them and you said that you were, and that you did understand them. If you would sign that. That tells me, the court, the judge, whoever, that I did read the rights to you and that you understood them and agreed to waive and answer some questions. I will ask you, that if you do agree to talk with me, that you answer all of my questions truthfully.

M.L. Yeah.

G.P. Because you indicated that what has happened tonight is very bad, but you would like to talk about it. And at least offer the court the fact that you did own up to it and was willing to take responsibility for what occurred. So, if you're not completely truthful with me, then the court's just not gonna look at this confession or statement as it

should. When did you and your brother Ben and Gary, when did ya'll get together today?

M.L. We've been together a few days. Well, me and Gary has, that's my brother's buddy. We run around together all the time.

G.P. Alright, on this day particularly, and when I say "this day" I'm talking about what is now yesterday, December the 5th which was Tuesday. What time did ya'll get together yesterday.

M.L. Well, we was together all day, cause Ben stayed over at our place.

G.P. Okay. When you say "our place" where is "our place"?

M.L. Over in Blacksburg.

G.P. Where about's in Blacksburg?

M.L. (Not understandable) Court Trailer Park.

G.P. Okay. What time did ya'll leave that residence this morning?

M.L. I have no idea. I'd say it was about, man, I don't really know. Besides, I've been drunk all day, I was drunk when I got up.

G.P. What have you been drinking today?

M.L. Liquor.

G.P. What kind of liquor?

M.L. Vodka, Evan Williams, Jim Beam, little bit of everything.

G.P. Did ya'll buy that different kind of liquor, or how did you come across that liquor?

M.L. They got it out of the house.

G.P. And when you say "they got it out of a house", who are you talking about "they"?

M.L. Ben.

G.P. Talking about Ben and who else?

M.L. Lilly, just Ben.

G.P. Just Ben, or Gary was with them.

M.L. Well the house (not understandable) we was all on it.

G.P. Where's the house located?

M.L. Somewhere up in Floyd is all I can tell ya.

G.P. Was that yesterday?

M.L. Day before or something.

G.P. Now, when we, was it a residence or was it a store?

M.L. Residence.

G.P. So you went to a residence, you got the liquor out, and what else did you get?

M.L. I don't, I don't really know, you know, everything that was got out cause I was drunk.

G.P. How did they get into the residence?

M.L. Kicked in the door or something.

G.P. Who actually went into the residence and brought the items out?

M.L. All of us.

G.P. So you brought out the liquor, several different bottles and different brands?

M.L. Yeah.

G.P. Any other items you brought out?

M.L. That's all that I brought out, that I cared anything about.

G.P. Okay. Did Gary bring anything out of the house or Ben?

M.L. I think they got some guns or something.

G.P. Do you know what kind of guns they brought out?

M.L. Uh, a shotgun, a rifle and a pistol.

G.P. Okay. What gauge shotgun?

M.L. I don't even know.

G.P. Is it a single shot, double barrel, pump?

M.L. Pump.

G.P. Pump, pump action?

M.L. **\*\*No Statement Made\*\***

G.P. And the rifle, what kind of rifle is it?

M.L. I believe it was a .35

G.P. What kind of action would it have?

M.L. Lever.

G.P. And the pistol, is it automatic, revolver, what kind was it?

M.L. I guess a revolver.

G.P. Do you know what caliber it was?

M.L. A .38.

G.P. And they all came out of a residence of Floyd County?

M.L. **\*\*No Statement Made\*\***

G.P. Do you know who's residence it was?

M.L. **\*\*No Statement Made\*\***

G.P. What area was it in? I don't know much about Floyd.

M.L. Ah, like on the way to Indian Valley somewhere.

G.P. Okay. On the way to Indian Valley.

M.L. Yeah.

G.P. What kind of house, was it a brick residence, wooden residence, aluminum siding?

M.L. Aluminum siding.

G.P. Do you know what color?

M.L. It was dark.

G.P. Did this happen during daylight hours or after dark?

M.L. After dark.

G.P. No one was at home?

M.L. Everything looked dark anyway, you know, no one was home.

G.P. Okay. Now up until yesterday when ya'll left, all three of you left yesterday in Blacksburg, you say you don't remember about what time that was ya'll left your house or wherever you were staying and started driving around?

M.L. Huh uh.

G.P. Was it daylight?

M.L. Yeah. About the time it started raining, I guess.

G.P. What were ya'll driving around in?

M.L. Thunderbird.

G.P. What kind?

M.L. Thunderbird.

G.P. Who's Thunderbird is it?

M.L. Well, it's a dam Mercury Cougar.

G.P. Mercury Cougar?

M.L. Yeah.

G.P. Who's was it? \

M.L. Ben's.

G.P. What color was it?

M.L. Like a copper color.

G.P. Okay. Did ya'll drive it around about all day?

M.L. We drove it around for a while.

G.P. You pretty much stay in Montgomery County with that car?

M.L. Well, we tried to hang down at Floyd where the back roads are, you know. Cause the law don't go on the back roads that much.

G.P. And that was yesterday you're talking about?

M.L. Well, yeah. Yesterday, everyday, you know, we try to stay out on the back roads.

G.P. What become of that Mercury Cougar?

M.L. You know, I don't even know what happened to it. I just remember stopping at a dam red, the car cutting out at a red light.

G.P. Your car was cutting out at a red light, it just stopped on you?

M.L. Yeah.

G.P. Who was in the car at that time?

M.L. Me, Ben and Gary.

G.P. So it was still you and Ben and Gary . . .

M.L. Yeah.

G.P. riding during that time. Do you know about what time of day it was?

M.L. Right after dark.

G.P. Okay. What transpired at that time?

M.L. Well, dude wanted to get him another car.

G.P. Who wanted to get another car?

M.L. Ben.

G.P. Ben?

M.L. Yeah.

G.P. How did ya'll go about getting another car?

M.L. Well . . .

G.P. Just be honest with me.

M.L. we went across the parking lot and dude pulled a gun on this other dude and told him we was taking his car and he was going with us.

G.P. So who pulled the gun on the dude?

M.L. Ben.

G.P. So Ben pulled the gun, which gun did he pull?

M.L. Pistol.

G.P. Same pistol that was got out of the house over in Floyd?

M.L. \*\*No Statement Made\*\*

G.P. Did ya'll know this dude?

M.L. That we . . .

G.P. That you got the car from?

M.L. No. I never go to town.

G.P. So you never seen him before?

M.L. Huh uh.

G.P. So Ben told this guy, said "We're gonna take your car and we're gonna take you with us."? So did all of ya'll load into the car then?

M.L. I had to or get left man, I was so drunk.

G.P. Okay. Who drove this dude's car off?

M.L. Ben.

G.P. Ben drove? Who had been up front with him, the passenger?

M.L. Gary.

G.P. Gary would up front?

M.L. Yeah.

G.P. And then that would put you and whoever this dude was in the back?

M.L. Yeah.

G.P. What happened from that point?

M.L. Well, not much of nothing man, we just rode. I was so dam scared I was sitting up against the door, man. You know, watching everybody.

G.P. Why was you scared, you had the gun didn't you?

M.L. No. I, I didn't have no dam gun, no.

G.P. Okay. So . . .

M.L. That's the first time I ever been through anything like that, you know, I didn't know how to take things, I just sat back.

G.P. Well, what was the dude saying during, I mean, was he scared or, was he asking to be let out or, begging.

M.L. He didn't act like it, he didn't act like he was scared or nothing.

G.P. How old was this boy that had the car?

M.L. Twenty-five maybe.

G.P. Anything that you remember about him? What he was wearing or anything that stood out?

M.L. I don't really remember man, I was drunk.

G.P. So he was in the back seat with you?

M.L. Yeah.

G.P. So you drove, where did ya'll drive to?

M.L. Uh, down like you're going to McCoy maybe.

G.P. So you left the Blacksburg area like you're going toward McCoy? That's what they call Price's Fork Road, White Thorne Area, McCoy down that area, is that the way you went?

M.L. Down through there somewhere. I know about where you're talking about, I just ain't familiar with it, you know.

G.P. What was ya'll going to do, what was the plan to do with, not only the car, but this guy that was in there with you.

M.L. We just needed a ride somewhere.

G.P. Okay. So you rode down toward the McCoy of Falls Area, what transpired after that?

M.L. Well, we drunk us another, another litter [sic] of liquor I think, yeah a good litter [sic], and then they said something about wanting to go to Giles County.

G.P. Okay. Who wanted to go to Giles?

M.L. Ben.

G.P. Ben?

M.L. Yeah.

G.P. Okay. What happened then?

M.L. We ended up down here.

G.P. Okay. Anything else happen in between there?

M.L. Nothing that you don't already know, man.

G.P. Alright. I wanna hear your side of it.

M.L. Well . . .

G.P. If you would speak up, I do have a bad time of hearing.

M.L. Me and the blond headed dude, we didn't have nothing to do with shooting him, you know.

G.P. Who's the blond headed dude?

M.L. Gary.

G.P. Okay.

M.L. We didn't have nothing to do with the shooting.

G.P. Alright. Well, tell me about it.

M.L. Well, it's kinda hard cause he's my fucking brother man.

G.P. I know that. And normally I can understand if you don't tell on family members. But when you get down to the fact that he may be dragging you right in to a life time sentence, I think it's time for family ties to be broken. Especially if he done it without . . .

M.L. Is he . . .

G.P. Consent of everybody. If ya'll had all said "Yeah, let's all kill him" or something, I think you need to share in it. But now, if a family member done something of this magnitude, and took it upon himself to do it, that's my opinion.

M.L. Yeah.

G.P. And he's your brother, and I understand that. But I think it's . . .

M.L. Well, is he saying that me and that other dude done it?

G.P. Well, I told you to start.

M.L. **\*\*Statement Muffled\*\***

G.P. I'm not gonna tell you what each person said.

M.L. Well.

G.P. I simply told you before we started that they said you didn't do it. And all I'm asking you for is what you saw and what you heard. I know it's hard to say things against your family, but I think in this matter, I don't think anybody's gonna hold it against you. And as you said, I know what happened, but I need for you to tell me what happened. It's not an easy thing got talk about.

M.L. How many times was that dude shot?

G.P. I can honestly tell you, I don't know. More than once, I know what, but I do not, it didn't occur in my county so I'm not sure how many times he was shot. I'd have to ask the right people. I know it was more than once. Number one, what happened? Ya'll was going down the road, apparently you stopped.

M.L. Yeah.

G.P. Why did you stop?

M.L. Well we was all gonna get out of the car first.

G.P. Okay.

M.L. Then, Ben, you know, he just freaks out, and says "Fuck this we'll take this dude's car and we'll leave him behind."

G.P. Okay.

M.L. You know, and I'm setting up there, "Godam what's be gonna do" me and Gary was. And they go over here beside this fucking I guess it's a dump or some fucking something, I don't know, you know, dude shoots him.

G.P. When you say "dude shoots him" which one are you calling a dude here?

M.L. Well, Ben shoots him.

G.P. Talking about your brother, what did he shoot him with?

M.L. Pistol.

G.P. How many times did he shoot him?

M.L. I heard a couple of shots go off, I don't know how many times he hit him.

G.P. Where were you when this was going on?

M.L. In the back seat of the car still yet.

G.P. So you never got out of the car?

M.L. Right.

G.P. Did Gary ever get out of the car?

M.L. Huh uh.

G.P. So Ben stopped, got out of the car, I guess he made whoever the other guy is, that we don't know his name, made him get out of the car?

M.L. \*\*No Statement Made\*\*

G.P. And you thought they was just gonna let him off and then take his car, is that what you thought?

M.L. That's what me and Gary both thought.

G.P. Did you hear an argument between these two or did they wrestle or fight or . . .

M.L. I didn't see no fight man, we had the windows rolled up and music blaring.

G.P. Could they, were they arguing or do you think this guy tried to run or, why do you think Ben would shoot him?

M.L. I don't know, don't know that.

G.P. So, you said Ben shot him, did you see the flash or how do you know Ben shot him, let me ask you that?

M.L. Well, he dropped.

G.P. How far was Ben from him?

M.L. It was about as far as from me to them dudes in there.

G.P. Which was about ten to fifteen feet, you think that's accurate?

M.L. I'd say ten to fifteen yards.

G.P. Ten to fifteen yards. Did anything transpire right before he shot him?

M.L. What do you mean?

G.P. I understand that when they found the body, he didn't have his clothes on. Do you remember anybody telling him to take his clothes off or why he wouldn't had his clothes on?

M.L. I don't know.

G.P. How long had ya'll been stopped before you heard the shots?

M.L. About five minutes maybe.

G.P. And then I guess Ben got back into the car?

M.L. Yeah.

G.P. What was said?

M.L. After he got back in the car?

G.P. **\*\*No Statement Made\*\***

M.L. Nothing. I was wanting out, you know, I didn't say nothing to nobody.

G.P. You knew he had shot him?

M.L. Yeah.

G.P. You didn't ask "Why did shoot him?" Or did Gary ask him "Why did you shoot him?"

M.L. No. Neither one of us said a word.

G.P. Did he offer any reason why he did shoot him?

M.L. Huh uh.

G.P. Up until that time, ya'll were the only four in the car? You, Ben and Gary and this guy?

M.L. Right.

G.P. Did you see anybody else there where ya'll stopped?

M.L. I wasn't really looking for anybody.

G.P. Okay. But apparently you could see well enough to see that this guy was about ten yards or fifteen yards from Ben?

M.L. Yeah, something like that.

G.P. And then you heard, when they fired the shots, were they pow-pow or was there some time in between them?

M.L. Pow-pow, you know.

G.P. Pretty quick?

M.L. Yeah.

G.P. And then he got, did he get back in the car immediately or did he stay outside for awhile?

M.L. Well, he got in, he didn't waste too much time.

G.P. And then he was driving?

M.L. Yeah.

G.P. And then ya'll just pulled off and left?

M.L. Yeah.

G.P. Ya'll didn't check on the guy to see if he was dead or did Ben check on him and say he was dead?

M.L. It scared me man, I wanted to get the hell out of there.

G.P. No, but did Ben say "He's dead"?

M.L. Yeah.

G.P. Ben did say he was dead, so Ben walked back to him you think and checked him?

M.L. I don't know if he walked back but he must have knew something.

G.P. Would he have had enough time, from the time you heard the shots, to have walked back to him and then come back and got in the and drove off?

M.L. Do what now?

G.P. What I'm saying, you said he was about ten or fifteen yards away, would Ben had enough time to shoot him, walk over to him and check to see if he was dead and then come back and get in the car? You said there was a little time period in there from the time you heard the shots until the time Ben got back into the car. And Ben knew he was dead, Ben told you he was dead. So, apparently Ben had checked him or for some reason thought he was dead.

M.L. Yeah, or he could'a stood there too.

G.P. Did Ben say where he shot him?

M.L. Huh uh. I didn't ask either.

G.P. So ya'll stayed in the car. You were still in the back?

M.L. Yeah.

G.P. What happened from that point?

M.L. What do you mean what happened after that?

G.P. Where did ya'll go after you pulled off and left the body and kept coming towards Giles County.

M.L. Well, we just went riding around drinking beer and liquor.

G.P. Okay.

M.L. We got, we stopped and bought us a case of beer somewhere.

G.P. Okay. Do you remember coming into the M & L or the H & L Mini Mart over, I can tell ya it's in the Eggleston area, I don't know if you know where that is. It's out in the country.

M.L. All of these places out in the country.

G.P. Well, these are even more country than most, but it's a little, bitty, country store. There was an old man and an old woman in it.

M.L. I think I remember something about it.

G.P. What do you remember? You know, here again you're being honest and the story matches, all I'm asking is just continue to be honest. What happened when ya'll stopped at that little country store where the old man and the old woman was running it?

M.L. Uh, well, we went in and first of all, they wanted to rob it and they figured that, Ben figured that he was in deep enough, you know, where he shot that mother fucker, you know. I guess he just thought I ain't got nothing to loose [sic], I'll just rob this bitch (not understandable) money.

G.P. Okay. Who went in the store?

M.L. All of us.

G.P. Did any of you carry any weapons with you?

M.L. One of them had one, I didn't have none.

G.P. You didn't have any weapons with you?

M.L. Huh uh.

G.P. Do you know who carried the weapon in?

M.L. Huh uh, I don't know that.

G.P. What kind of weapon did they carry in?

M.L. Well, the pistol.

G.P. Okay. And what transpired when you got inside? How many people were in there other than ya'll?

M.L. Just the old man and woman.

G.P. Alright, when you got inside, where did you go?

M.L. I just walked, let's see, I think it the aisles like that . . .

G.P. Uh huh.

M.L. and that goes back to the beer. And they up here fucking around, and I go back there and get some beer. You know, and part of what went on, they had robbed this mother fucker, you know. And I just thought, "Hell, a twelve pack of beer ain't gonna hurt nothing." So I just took the beer, I took my twelve pack of beer.

G.P. Okay. You didn't pay for it, you just took it?

M.L. Right. I was so drunk, I don't do that shit, you know, if I'm sober. I had money in my pocket. I figured.

G.P. Did ya'll, was any money taken from the store that you know of?

M.L. They got some.

G.P. Did you end up with any of it?

M.L. Three ways.

G.P. Okay. Ya'll split it evenly three ways. You know how much your share was?

M.L. It wasn't much man, about a hundred, under a hundred dollars.

G.P. Did ya'll fire any shots in to that store?

M.L. No.

G.P. No shots were fired there, no . . .

M.L. No.

G.P. was the man and woman hurt to your knowledge?

M.L. Not to my knowledge, no.

G.P. Okay. When you went in there, of course, Ben already told "Let's go in there and this store." So you all three went in there, one of them carried a gun, you don't whether it was Ben or whether it was Gary?

M.L. Right.

G.P. Did, what did Gary bring out of it?

M.L. Beer.

G.P. He had beer, did he have anything else?

M.L. I don't know.

G.P. What did Ben bring out?

M.L. I ain't for sure man.

G.P. Alright when ya'll split the money up a little later, who pulled the money out, who had the money?

M.L. It come from the back. This time I was riding up front.

G.P. Okay. So, when you left the store ya'll had a, who was driving when you left?

M.L. Gary.

G.P. Gary was driving and you were up front?

M.L. Yeah.

G.P. And then that would have put Ben in the back?

M.L. Yeah.

G.P. From once you robbed the store, all three of you got back in the vehicle, what did you do then?

M.L. When all three of us got back in the vehicle?

G.P. Uh huh.

M.L. We took off.

G.P. Okay. Did ya'll stop anywhere along the way after that, before you got to the next store?

M.L. Huh uh.

G.P. When did ya'll divide the money up? You said ya'll divided it three ways and it was about a hundred dollars all together.

M.L. Down at the sandbar.

G.P. Okay. That was, of course, that was obviously after you left the store, you already had the money. Then you said the money came from back, so it must have come from Ben, right?

M.L. **\*\*No Statement Made\*\***

G.P. Is that a yes or a no?

M.L. Yeah.

G.P. Okay. So ya'll pulled in down around the sandbar, split the money, and then where did you go after that?

M.L. Over to the other store.

G.P. And when you say "to the other store" are you familiar with Pembroke?

M.L. **\*\*No Statement Made\*\***

G.P. But you went to another convenient store type establishment?

M.L. Yeah, across from Dairy Queen.

G.P. Okay. Who went in the store there?

M.L. Me and Gary.

G.P. And where was Ben on that one?

M.L. Driving.

G.P. Ben was driving?

M.L. **\*\*No Statement Made\*\***

G.P. Did you carry a weapon in with you . . .

M.L. Huh uh.

G.P. when you went in the store? Did Gary carry a weapon in?

M.L. Yeah, Gary had one.

G.P. What did he carry in with him?

M.L. A pistol.

G.P. Okay. You stopped there apparently if you went in with a pistol and all you stopped there to rob that store, is that right?

M.L. We stopped there for something, I don't know.

G.P. Did ya'll discuss it before you went in, say "Ben you stay here and we're gonna go in and rob this" or what was the discussion?

M.L. We was all so drunk.

G.P. Okay. But you remember you went in, Gary went in, he had the pistol and Ben stayed in the car. What happened once you got inside?

M.L. Well . . .

G.P. Who went to the clerk, who talked to the clerk?

M.L. Gary.

G.P. Okay. And do you know what Gary asked her or told her?

M.L. No, she, but it must have been funny cause she was laughing, she wouldn't stop laughing.

G.P. Okay. Did Gary show her the gun?

M.L. Yeah.

G.P. And tell her this was a robbery?

M.L. Yeah.

G.P. And she was laughing?

M.L. **\*\*No Statement Made\*\***

G.P. Okay. What happened, transpired at that time?

M.L. Some old man from outside come in and seen what taking and he tried taking the gun from Gary.

G.P. Uh huh. And then what happened?

M.L. Well, they got their stuff, we got broke up and we left.

G.P. Ya'll jumped back in the car?

M.L. Yeah.

G.P. Where did you get into, front or back?

M.L. I don't even remember, man. Back maybe.

G.P. Okay. And then you drove off?

M.L. Yeah.

G.P. What happened as you drove off?

M.L. Nothing really.

G.P. Do you recall someone firing a shot out the window because someone was following you?

M.L. Yeah.

G.P. Who fired the shot out the window?

M.L. I don't know. I don't know who fired the shot.

G.P. Alright. If Ben was driving, Gary was in the front seat and you were in the back, did you fire the shot?

M.L. I don't even know if I was in the back. I could have been in the front.

G.P. Okay.

M.L. I don't know.

G.P. Gary could have been in the back.

M.L. Yeah.

G.P. We know Ben was driving.

M.L. Yeah.

G.P. Well, did you fire the gun?

M.L. Huh uh.

G.P. Which gun was fired?

M.L. I don't know.

G.P. But you remember hearing a shot, but you don't know whether Ben or Gary fired it?

M.L. Right.

G.P. And then what happened shortly after that?

M.L. We lost 'em.

G.P. Okay. So you know the reason the gun was fired was cause someone was following you very closely?

M.L. Yeah.

G.P. Did they fire the gun at the car that was following you or just shooting it up in the air?

M.L. I don't know.

G.P. Okay. Do you remember what happened when your vehicle stopped?

M.L. **\*\*No Statement Made\*\***

G.P. How come ya'll to stop and leave your car?

M.L. It blowed up.

G.P. Just stopped running with you?

M.L. Yeah.

G.P. What did ya'll attempt to do then?

M.L. Walk.

G.P. And then is that when the police showed up?

M.L. Uh huh.

G.P. What did Ben do when the police showed up?

M.L. I wasn't around, I don't know.

G.P. What did you do?

M.L. I was already gone.

G.P. Where did you go?

M.L. Running down the road.

G.P. Did you go into the wooded area at all?

M.L. **\*\*No Statement Made\*\***

G.P. Was, that's a yes, is that right? You did go into the wooded area some?

M.L. **\*\*No Statement Made\*\***

G.P. Where did Gary go?

M.L. I don't know, I lost him.

G.P. What did you carry with you when you left the car and took off running?

M.L. I didn't have nothing.

G.P. Was you carrying the pistol with you?

M.L. I didn't have shit man.

G.P. You didn't have the pistol with you. My understanding was you did have a pistol and I may be wrong.

M.L. No.

G.P. You didn't have the pistol?

M.L. Huh uh.

G.P. You didn't take any guns or anything with you when you ran?

M.L. Huh uh.

G.P. Okay.

M.L. Just spur of the moment man, I seen the law and I was gone.

G.P. And where were you picked up?

M.L. Huh?

G.P. Where were you picked up? Did the police pick you up?

M.L. Up there where that dude rents canoes on 460.

G.P. How did you get up there? Did you walk all the way, or run?

M.L. Jog.

G.P. Didn't get a ride or anything, jog all the way up there?

M.L. **\*\*No Statement Made\*\***

G.P. Everything you told me is true, to the best of your recollection?

M.L. Yeah.

G.P. Okay. Take a break there and I'll be right back. Did you drink all that? I'll get you some more water here in a minute.

M.L. Alright.

G.P. What did you tell the police your name was?

M.L. Michael Raider.

G.P. Michael Raider? Why did you do that for?

M.L. I just did.

G.P. Is there a Michael Raider, do you know one?

M.L. Yeah.

G.P. How many people was with ya'll tonight? Not counting the guy that got shot?

M.L. Just me, Ben and Gary.

G.P. There never was a forth [sic] person then?

M.L. Huh uh.

G.P. Okay. Anything you wanna ask me?

M.L. Huh uh.

G.P. You, go ahead . . .

M.L. What all are you going to try and charge me for?

G.P. Well, here in Giles County, by your own admission and by statements of others, plus you'll be identified by the store owners and things, you'll be charged with two counts of armed robbery. And you'll be charged with using a fire arm in the commission of a felony. That doesn't necessarily mean that you had the gun on you, but a gun was used in the commission of a felony in that armed robbery. That's the things that I'll charge you with. Naturally, Blacksburg and Montgomery County and Floyd County officials are gonna be talking to you about what happened in their county. At any time today, have you fired a weapon at all?

M.L. Yeah.

G.P. Where did you fire a weapon?

M.L. I don't remember where it was at, but I did.

G.P. Do you remember what you shot at?

M.L. A beer can.

G.P. What, which weapon did you use?

M.L. A pistol.

G.P. Okay. My evidence tech, in a few minutes, I'll ask your permission to take a gun shot residue which is a little thing that they dab on you to collect any gun powder that's on you. If you say you shot the gun,

then he'll probably find some, but he'll still do it as something that we have to do. He'll ask you permission to do it, so.

M.L. Yeah.

G.P. If you have no more questions of me, I will end the interview at 2:12 AM.

Transcribed by:  
Christy Cumbee

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#### Testimony of Gary Price/Cross

\* \* \*

[814] Q. All right. And for those of us who don't know that much about Pembroke, is there a Dairy Queen near the M & W Mark, Market?

A. It's directly across from the Dairy Queen.

Q. Same side of the street?

A. No, sir, opposite side.

Q. Okay. And that was the only time you spoke with Mr. Mark Lilly about these incidents?

A. That's correct.

Q. Thank you. Answer any questions the defense may have, please.

THE COURT: Mr. Tuck.

#### CROSS-EXAMINATION BY MR. TUCK:

Q. I'm going to draw your attention to page, well, I think they need to collect the transcripts first, but I'm going to draw your attention to Page 4 of the transcripts. I believe that Page 4, you ask a long question at the bottom of that, when did you, ah, and your brother and Ben and Gary, when did y'all get together today? And I believe Mark Lilly's response and [815] correct me if I'm wrong was, we'd been together a few days, well, me and Gary has, that's my brother's buddy. We all run around together. And it's his brother's buddy, is that correct? Is that what he said?

A. I'm, I'm still looking, sir.

Q. Okay. Page 4, center.

A. Okay.

Q. Now, he would later give you indications that he and Gary Barker were in fact living together, is that correct? He said that it was his brother's buddy, but later on he gave you indications that he, he being Mark Lilly, and Gary Barker were living together, is that correct, in Merrimac?

A. Yeah, I later learned that. I'm not sure exactly who furnished me that information.

Q. You didn't learn that information from Mark?

A. I may have. I just don't recall without refreshing my memory.

Q. Now, Page 5, I believe you were asking him about the, where they got the liquor at and I believe you [816] asked him a question, and when you say they got it out of the house, who were you talking about they? Is that correct? You asked that question?

A. That's correct.

Q. And his response was what?

A. Ben.

Q. Okay. And then you asked him, you talked about Ben and who else and then what was his response?

A. Lilly, just Ben.

Q. Now, later on I believe you indicated that -

MR. SCHWAB: The tape is what speaks for itself. If the defense counsel would like the tape played again at certain parts, we have no objection, but he's asking the officer from the transcript what he said and I believe the purpose of the transcript was to aid the jury and they are the deciders of the facts, not myself, not the investigator, nor Mr. Tuck.

THE COURT: That, that is correct, Mr. Tuck.

MR. TUCK: Your Honor, he was present [817] and now I'm sure he's not going to remember this conversation verbatim and we can go through and say do you recall asking him this question and I will take the transcript over to him and he'll say, yes, I did ask that question, and I'll say do you recall that response and then we can go through that and we'll be here for the next -

THE COURT: That will be more cumbersome, I admit, but over the objection of the Commonwealth, I think the objection is well taken, so I think we need to utilize the -

MR. TUCK: If the Commonwealth wishes to object, then we'll go through it in that, that process. I was just looking to save the Court and the -

THE COURT: Right. I think because of the objection, we need to utilize the tape.

MR. TUCK: Utilize the tape or refreshing the individual's memory?

THE COURT: Refresh, refresh his memory.

MR. TUCK: Okay.

[818] Q. Page 5, do you remember asking a question about what they got out of the house or who were, were they talking about they? Do you remember, do you recall asking that question?

A. Yes, I do.

Q. And do you recall what the answer was? When they, when you indicated they, do you recall -

A. I asked, ah, they got at a house, who are you talking about they? Mark Lilly, Ben.

Q. Okay. And did, did you then later ask a question about Ben and who else?

A. My next statement was, talking with Ben and who else? Mr. Lilly stated, or Mark Lilly stated, Lilly, just Ben.

Q. Now, I believe, now, let's, let's go back a second. Before this interview, had you told Mark Lilly hat you had spoken with anyone?

A. Yes, I had.

Q. And who did you tell him that you had spoken of? Was it Gary Barker?

A. It would have been Gary Barker because [819] that's the only one I had spoken with.

Q. So, you talked to Gary Barker right before that. Then you indicated, I believe you asked him another question, just Ben or was Gary with him, or with them?

A. That's correct.

Q. And did you later, ah, did he later admit that, well, we were all in on it?

A. That's correct, he did.

Q. But his first indication was, it was just Ben, is that correct?

A. That was the answer that he gave, yes, sir.

Q. Now, he indicated that when they were over in Floyd, he was already intoxicated, is that correct, before they had broken in? I'll draw your attention to Page, top of Page 6 and bottom of Page 5, if that would refresh your recollection.

A. I asked the question, so, you went to a residence, you got the liquor out and what else did you get?

[820] Q. And -

A. And Mark Lilly's reply, I don't, I don't really know, you know, everything that was got out because I was drunk.

Q. Okay. So, he was drunk at the time, before he had went there?

A. That's the indications, -

Q. Is that correct?

A. Yes, sir.

Q. You also indicated or asked some questions about the residency. Did he indicate whether he knew who the person's home was that they were robbing or where it was?

A. He indicated in Floyd County, somewhere around Indian Valley.

Q. And I believe there's no statement, did he indicate that he knew where it was exactly or specifically or did he know the person?

A. His response or indication was, he did not know the people or did not know exactly where it was.

Q. Now, Page 9, and we're now getting into [821]the where I think you're asking him questions, refresh your recollection about the Price's Fork area and you asked him to, you asked him about the car and how he got it. And do you recall what he said after you asked him that question or asked him to be honest with you?

MR. SCHWAB: Your Honor, I again object. It's not what he recalls. It's what the tape says.

THE COURT: It is and I'm going to let you, let Mr. Price refresh his memory -

MR. TUCK: All right. I'll be happy to.

THE COURT: Of the transcript.

A. My last statement, just be honest with me and Mark Lilly replied, we went across the parking lot and dude pulled a gun on this other dude and told him we was taking his car and he was going with us.

Q. All right. He didn't mention any taking a wallet out or anything along those lines or hiding behind trees at any point in time, did he?

A. Ah, not to be, no, sir.

Q. He was just walking across, straight [822] across the parking lot?

A. We went across the parking lot.

Q. And there was no indication that Ben asked him for the gun or anything along those lines, is that correct?

A. His statements to me, there was no indication, no.

Q. That Ben had the gun? Already, so, because he pulled it, is that correct?

MR. SCHWAB: Your Honor, he's asking him questions that have already been presented in the tape.

THE COURT: Yeah, once again, we've got to confine them to his recollection as refreshed by, by the tape.

Q. All right. To your recollection, do you recall him saying that Ben Lilly already had the gun or indicate that he already had the gun or did he say that Ben Lilly asked him for the gun?

A. My recollection -

Q. Based on your recollection, based on your conversations that, your memory?

[823] A. Yes. My next statement was, so who pulled the gun on the dude? And Mark Lilly's reply was, Ben, indicating to me that he already had the gun.

Q. All right. I believe he also indicated that he never went, never went to town, is that correct?

A. When I asked him if he knew the subject, his indication was, I didn't know him because I never go to town.

Q. Now, did he indicate that he didn't have a gun at any point in time? Would that be a correct statement that he never had any guns? He personally?

A. At the end of the tape, he said that he had fired the gun that day.

Q. All right. He fired a gun earlier in the day at a beer can?

A. That's correct.

Q. Other than that one indication, did he ever indicate -

MR. SCHWAB: Objection, Your Honor. That is a question for the jury to decide. Not for Investigator Price to decide.

[824] THE COURT: Right. As I say, -

MR. SCHWAB: They have heard the tape.

THE COURT: As I say, you must stay within the tape and you may use the transcript to have Mr. Price, allow Mr. Price to refresh his memory.

Q. I would draw your attention to Page, the bottom of Page 10, and at the top of Page 11. I believe they're riding down the road at this point in time. I draw your attention to that area. Did he indicate that he had a gun at that point in time?

A. He indicated that, ah, his statements, no, I, I didn't have no damn gun.

Q. Now, on Page 13 he asked you the question if you remember it whether Ben was saying that he and

Gary Barker were involved, is that correct? Saying that, Ben was saying that they had done it. Do you recall that? Page 13.

A. I had just asked him a question and he's your brother and I understand that, but I think he, I think it's and Mark Lilly said, well, is he saying that me and the other dude done it?

[825] Q. So, that was one of his questions to you, is that correct?

A. That's correct.

Q. Now, did he ever, going to the Whitethorne landing, did he ever indicate that he had ever gotten out of the car?

A. No, sir, he did not.

Q. In any of his statements or any of the tape, did he ever indicate that they'd had Alexander Defilippis cover his face at any point in time during the course of the, the carjacking to when Alexander Defilippis is killed? In any of the, in any of the statements, do you recall him ever making that statement during, Mark Lilly making that statement ever?

A. That they had the victim cover his face?

Q. Yes. Or close his eyes or put his head down or anything along those lines?

A. Not to my knowledge, no.

Q. And I believe he indicated that they never got out of the car? He and Gary Barker never got out of the car at the Whitethorne landing?

[826] A. That's correct.

Q. Now, Page 15, did Gary Barker, or not, excuse me, Mark Lilly indicated that when Benjamin Lilly supposedly shot Alexander Defilippis it was, I believe you asked him a question about ten, fifteen feet and he said, no, ten, fifteen yards, is that correct?

A. That was his reply, yes.

Q. That was his words, not yours?

A. Mark Lilly's.

Q. Mark Lilly's words, ten to fifteen yards?

A. Yes.

Q. Did he ever indicate that it was a point blank, that he was up point blank, it was always ten to fifteen yards, is that correct?

A. It, the, I think the two references he made both times were ten to fifteen yards.

Q. So, that's thirty to forty-five feet, is that correct?

A. That's correct.

Q. I was just checking my math. Now, Page 16, I believe that there was indication, ah, -

[827] MR. SCHWAB: Your Honor, I'm again going to object because he's doing nothing but reading the transcript. He can't cross-examine the investigator for what was on the tape. What was on the tape speaks for itself.

THE COURT: All right. But you may refresh his memory by showing him a copy of the transcript.

Q. Did you ask Mr. Lilly why his brother had done this or if he stated why he had done this?

A. My question, you didn't ask why did he shoot him or did Gary ask him why did you shoot him and Mark Lilly's reply, no, neither one of us said a word.

Q. And did you ask him if he offered a reason why he did it?

A. Yes, I did.

Q. And -

A. Mark Lilly's reply was huh-uh.

Q. Now, you, I believe you indicated or asked him a question about what the lighting was like at the bottom of Page 16. Refresh your recollection. I believe [828] that he indicated that he could see thirty to forty-five feet, is that correct?

A. Ah, I -

Q. Ten to fifteen yards?

A. My statement was, apparently you could see well enough to see that this guy was about ten yards or fifteen yards from Ben? Mark Lilly's reply, yeah, something like that.

Q. And I believe he indicated that Benjamin Lilly got in the car and left the scene driving. He was the driver I believe.

A. He was the driver as they left that Whitethorne area.

Q. I believe Mark Lilly indicated that he was in the back of the car the whole time and never got out of the car, is that correct? Page 18.

A. That was his statements to me, yes.

Q. Did Mark Lilly indicate who carried the firearm into the store over in Eggleston? Did he say he could remember who did that? Page 19.

A. Indicated he did not carry one, but [829] someone had.

Q. Could he tell you who had? Which one of the two? You've got Gary and Ben Lilly there. Could he tell you?

A. My question to him, do you know who carried the weapon in? And Mark Lilly replied, huh-uh, I don't know that.

Q. And I believe you asked him some questions regarding why did he take the beer at the bottom of Page 19, the top of Page 20. He indicated that he had money enough to pay for the twelve pack of beer in his pocket.

A. Yes, Mark Lilly just indicated he took twelve, a twelve pack of beer. My question, okay, you didn't pay for it, you just took it? And Mark Lilly's reply, right. I was so drunk I don't do that shit, you know, if I'm sober. I had money in my pocket.

Q. And I believe on Page 21 he's indicated that Ben was the one who took the money out of the cash register, is that correct? Page 21. They split the money and the money comes from the back -

MR. SCHWAB: Objection, Your Honor. I, [830] could he ask him if he asked who took the money out of the cash register -

Q. Did you ask -

MR. SCHWAB: Or where did the money come from?

Q. Or where did the money come from?

THE COURT: Just refer to the transcript.

MR. SCHWAB: Thank you, Mr. Tuck.

Q. Page 21.

A. Yes. My question, all right, when y'all split the money up a little later, who pulled the money out, who had the money? Mark Lilly's reply, it came from the back. This time I was riding up front and -

Q. Okay.

A. And my next question, so, when you left the store, who was driving when you left? Mark Lilly's reply was, Gary, which would have placed Ben in the back.

Q. So, based on that statement, that's why you indicated it came from Ben? The money came from Ben?

A. That's correct.

[831] Q. Because he was in the back. Now, on Page 23 you indicated that I believe the individual will be known as Mona Hylton was laughing when she was being robbed?

A. That was his statement, yes.

Q. And he stuck with that statement? Did he repeat it? You asked him, she was laughing I believe. Do you recall that?

A. Yes, I asked it and I said, okay, my statement, okay, and do you know what Gary asked her or told her and Mark Lilly's reply was, no, she, but it must have been funny because she was laughing. She wouldn't stop laughing and my statement, or my question, okay, did Gary show her the gun? Mark Lilly replied, yeah. And my statement, and tell her this was a robbery? Mark Lilly's reply was, yes, and she was still laughing.

Q. Did you ever ask him the question who fired the shot out of the car window after they left Pembroke?  
Page 24.

A. Yes, I did.

Q. And was he able to tell you who had fired [832] the shot out of the car? Did he indicate whether it was Gary or Ben or himself?

A. He indicated it was not him.

Q. Okay. But did he, could he say it was Gary or Ben? If you recall.

A. His answer, ah, who, my question, who fired the shot out the window? Mark Lilly, I don't know. I don't know who fired the shot.

Q. Now, I believe after their stop, you asked them a series of questions, after they had been stopped. And I'm drawing your attention to Page 26. You asked, did you recall asking him of, if he had anything or had the pistol?

A. Yes, I did.

Q. And what was his indication?

A. My question, was you carrying the pistol with you? And Mark Lilly's reply, I didn't have shit, man. And I further asked him, you didn't have the pistol with you? My understanding was you did have a pistol. I may be wrong. Mark Lilly's reply was, no.

MR. TUCK: Your Honor, if I might have a [833] moment?

THE COURT: All right, sir.

MR. TUCK: Your Honor, I don't believe I have any further questions.

THE COURT: All right, sir.

MR. TUCK: The Commonwealth may have some on redirect.

THE COURT: Thank you, Mr. Tuck. Mr. Schwab, do you have any questions on redirect?

MR. SCHWAB: Yes, Your Honor.

#### REDIRECT EXAMINATION

BY MR. SCHWAB:

Q. I believe Mr. Tuck asked you if there was a, one of the pages where he said, ah, what's the other guy saying? What are they saying about me? Do you recall what page that would have been on the transcript?

MR. TUCK: I believe it would have been, be Page 13, if that would be helpful to the Commonwealth.

MR. SCHWAB: It was Page 13?

MR. TUCK: Page 13, center of the [834] page, and I -

Q. So, he hadn't, you hadn't asked him any questions, about and he hadn't asked you any questions about who had said who had done what, is that correct, up till Page 13?

A. Up to that point, yes.

Q. And wasn't it on Page 9 that he said Ben was the one that used the gun to kidnap Mr. Defilippis? If I recall correctly.

MR. TUCK: Bottom of Page 9, if it helps the Commonwealth.

A. My statement, how did y'all go about getting another car? Mark Lilly's reply, well, I stated, just be honest with me. Mark Lilly, we went across the parking lot and dude pulled a gun on this other dude and told him we're taking his car and he was going with us. My question, so, who pulled the gun on the dude? Mark Lilly's reply, Ben.

Q. So, that was before he wanted to know what Ben was saying or what anybody else had said, is that correct?

[835] A. That was Page 9 as opposed to Page 13, that's correct.

Q. And would you, I want to make sure I got, the quote was right on Page 13, is that what's in the transcript, is that what you recall being on the tape? Mark Lilly's response?

A. Are we referring to the response, well, is he saying that me and the other dude done it?

Q. No, the top of Page 13, I'm sorry.

A. Where I advised him, I know that and normally I can -

Q. The, the his response. I believe it was to your question, well, tell me about it. From Page 12 and then it -

A. Okay. My question, all right, well, tell me about it. Mark Lilly's response, well, it's kind of hard because he's my fucking brother, man.

Q. Thank you.

MR. SCHWAB: That's all the questions I have, Your Honor.

THE COURT: All right. Thank you, Mr.

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[842] THE COURT? All right, Mrs. Skidmore, if you'd bring the jury in, please.

THE COURT: Mr. Schwab, call your next witness.

MR. SCHWAB: Investigator Ron Hamlin, of the Montgomery County Sheriff's Office.

CLERK: Do you swear the evidence and testimony you give in this matter will be the truth, the whole truth, and nothing but the truth, so help you God?

RON HAMLIN: I do.

THE COURT: Thank you, Mr. Hamlin. If you'll answer questions put forward by the Commonwealth and the defense, please.

MR. HAMLIN: Yes, sir.

RON HAMLIN RECALLED  
DIRECT EXAMINATION

BY MR. SCHWAB:

Q. Investigator Hamlin, you testified before. What I'd like to ask about you now is after you went to Giles County.

[843] A. Yes, sir.

Q. On the evening and the early morning hours of December the 6th. When you got there did you speak with Investigator Price of their Sheriff's office?

A. Yes, I did.

Q. And did you have occasion to speak with one, Mark Lilly, on that time?

A. Yes, I did.

Q. And when and where did you talk to him?

A. At the Sheriff's Office in Giles County.

Q. Do you recall what time it was or approximately?

A. Yes, sir. As I recall, it was around 2:30 something when I talked to him.

Q. And you had him sign a Miranda Waiver, is that correct?

A. Yes, I did.

Q. Did you use a tape recorder with the interview?

A. Yes, sir, I did.

Q. And did you have that tape transcribed?

[844] A. Yes, sir, I did.

Q. And you've seen a copy of the transcription?

A. Yes, sir, I did.

Q. Now, we know this isn't Montgomery County's equipment. Did you hear the tape on this machine today?

A. Yes, sir, I did.

Q. And did you compare it against the transcript at that time?

A. Yes, I did.

Q. And would you tell the Court whether or not the transcript is complete at this point?

A. It's complete. It's a couple of inaudibles in there that the secretary couldn't get.

Q. So, there's some things that may be audible on the tape that were not on the machine of Giles County that you couldn't get in Montgomery County?

A. Yes, sir.

Q. I'd like you to look at this. Is that the transcript that was prepared by the secretary for [845] Montgomery County?

A. Yes, it is.

Q. And except for what you've noticed today about some inaudibles, may be a little clearer, is that correct?

A. Yes, sir.

Q. And you have the tape here?

A. Yes, I do.

Q. All right.

MR. SCHWAB: Your Honor, we have discussed this. I understand and we acknowledge that there may be some omissions from the transcript, but again the transcript in a guide. There are some matters that were of low volume that may be more discernible on this equipment than was previously available, but again the transcripts will be offered to the Court and the jury to be used for following along and again it is the tape that is the evidence, not the transcript itself.

THE COURT: All right, sir.

MR. TUCK: Your Honor, Mr. Schwab and I and the Court discussed this matter and we may be able [846] to hear the inaudibles that are able to be heard and obviously those may not be on the transcript because Montgomery County's equipment is not as advanced apparently as the equipment over in Giles County and we don't have any objections to those inaudibles, but we do have an ongoing objection that's continuing.

THE COURT: All right, sir. I understand that. Thank you, Mr. Tuck. Go ahead and distribute.

MR. SCHWAB: There are fifteen pages. I believe some of the copies are faint. I apologize for that. You can take that up with the Board of Supervisors. There's a copy also for the Clerk and for the Court Reporter again to be placed with the record, but not to be introduced in evidence.

MR. SCHWAB: If everyone's ready -

THE COURT: Does everyone have their copy? All right, sir, go ahead.

MR. SCHWAB: Investigator, will you turn on the tape, please.

TAPE PLAYED INTO RECORD - INTERVIEW ON DECEMBER [847] 6, 1995, AT 2:30 A.M., WITH INVESTIGATOR BOB FLEET, LIEUTENANT R. L. HAMLIN WITH MARK LILLY

MR. SCHWAB: Investigator, can you turn it up just a little bit perhaps?

MR. SCHWAB: Continue your questions.

Q. Yes, not about the, that was the only time or the last time you talked to Mark Lilly?

A. Yes.

Q. Now, I believe this last week or the week, sometime in the month of October, you went to the Giles County Jail, is that correct?

A. Yes, I did.

Q. And that's when you got a blood sample from Gary Barker?

- A. Yes, Sir.
- Q. Did you also measure Gary Barker?
- A. Yes, sir, I did.
- Q. What was his height?
- A. Gary Barker's height, overall height is 5 foot 7 $\frac{1}{4}$  inches.
- Q. All right. And height to his shoulder?
- [848] A. He is 4 foot, 8 inches.
- Q. And Mark Lilly was also present -
- A. Yes.
- Q. Or was present in the same jail?
- A. Yes, sir, he was.
- Q. And did you measure him?
- A. Yes, sir, I did.
- Q. And what was his height?
- A. Mark Lilly's height overall is 6 foot, 2 inches.
- Q. And to his shoulder?
- A. 5 foot, 4 inches.
- Q. Thank you. That's all the questions I have.

THE COURT: Thank you, Mr. Schwab. Gentlemen.

MR. TUCK: If the Court would direct one of the bailiffs to collect the transcripts.

- THE COURT: All right, sir.
- MR. TUCK: I'd forgotten about that. Thank you, Mr. Jenkins.
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